82-1722

No.

In the Supreme Court of the United States

October Term, 1982

COUNTY OF MONROE; NANCY SHUKAITAS, Chairman, Monroe County Board of Commissioners, individually and in her official capacity; JESSE D. PIERSON, Member, Monroe County Board of Commissioners, individually and in his official capacity; and THOMAS R. JOYCE, Member, Monroe County Board of Commissioners, individually and in his official capacity,

Petitioners

v.

CONSOLIDATED RAIL CORPORATION,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SPECIAL COURT, REGIONAL RAIL REORGANIZATION ACT OF 1973

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QUESTIONS PRESENTED

1. Whether the Governmental Petitioners can properly be required to pursue injunctive relief on their antitrust claim in one court and damage relief on their antitrust claim in another, thereby requiring a single antitrust claim to be proved in two separate proceedings?

2. Whether the District Court lacks jurisdiction over the cause of action asserted by the Governmental Petitioners in the amended complaint in the antitrust action?

3. Whether the Railroad Court has the power to enjoin a coordinate District Court or the Governmental Petitioners before it from proceeding with an antitrust case for injunctive relief merely on the theory that the District Court is proceeding improperly and without subject matter jurisdiction?

4. Whether a final adjudication on the complaint in the Railroad Court can properly be made without affording the Governmental Petitioners the opportunity to plead, to present evidence and to participate in a trial or hearing?

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OPINIONS BELOW

The opinion of the United States District Court for the Middle District of Pennsylvania is printed in the appendix at 30a.

The opinion of the Special Court, Regional Rail Reorganization Act of 1973, is printed in the appendix at 56a.

JURISDICTION

The order of the Special Court, Regional Rail Reorganization Act of 1973, reprinted in the appendix at 63a, was entered on March 31, 1983. This Court's jurisdiction is invoked under §1152(b) of the Northeast Rail Services Act, 45 U.S.C. §1105(b).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 18:

§1337. Commerce and antitrust regulations; amount in controversy, costs

(a) The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies: Provided, however, That the district courts shall have original jurisdiction of an action brought under section 11707 of title 49, only if the matter in controversy for each receipt or bill of lading exceeds $10,000, exclusive of interest and costs.

United States Code, Title 45:

§1105. Judicial review—Special court; exclusive jurisdiction for civil actions

(a) Notwithstanding any other provision of law, the special court shall have original and exclusive jurisdiction over any civil action—

(1) for injunctive, declaratory, or other relief relating to the enforcement, operation, execution, or interpretation of any provision of or amendment made by this chapter, or administrative action taken thereunder to the extent such action is subject to review;

...

STATEMENT OF THE CASE

Monroe County, in its own right and on behalf of the Monroe County Railroad Authority, and the three members of the Monroe County Board of Commissioners (hereinafter, "Governmental Petitioners"), are the plaintiffs in an antitrust action filed in the United States District Court for the Middle District of Pennsylvania (hereinafter, "District Court").* The District Court has issued a temporary restraining order, after a finding of irreparable injury to the Governmental Petitioners, directing that the respondent, the Consolidated Rail Corporation (hereinafter, "Conrail") not dismantle a main rail line. Shortly after the filing of the action in the District Court, suit was instituted by Conrail in the Special Court, Regional Rail Reorganization Act of 1973 (hereinafter, "Railroad Court") against the Governmental Petitioners.** The Railroad Court has now enjoined proceedings before the District Court. The petition for certiorari should be granted and the final judgment of the Railroad Court, reversed so that the Governmental Petitioners can proceed before the District Court with their antitrust claims.

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* Monroe County, et al. v. Conrail, Civil Action No. 83-0167, United States District Court for the Middle District of Pennsylvania.

** Conrail v. Monroe County, et al., Civil Action No. 83-1, Special Court, Regional Rail Reorganization Act of 1973.

Statement of the Case

The antitrust action was instituted in the District Court on February 8, 1983, when the Governmental Petitioners filed a complaint and a motion for a temporary restraining order. Two days later, the Governmental Petitioners filed an amended complaint (Appendix 1a). Not content to proceed before the District Court to test the correctness of Conrail's own assertions that the District Court lacked subject matter jurisdiction over the antitrust case, Conrail filed its complaint before the Railroad Court on February 22, 1983, seeking injunctive and declaratory relief.

Conrail sought in the Railroad Court not an adjudication of the correctness or legality of its conduct under the antitrust laws, but rather a determination by the Railroad Court that the District Court lacked subject matter jurisdiction (Appendix 20a). Conrail also filed a "motion for preliminary injunction and declaratory judgment" (Appendix 23a). The next day, February 23, 1983, the Railroad Court issued an order directing that "written objections" be filed on or before March 4, 1983, and further directing that argument on Conrail's motion would be held at a time and place to be determined (Appendix 29a).

In the District Court, and after a series of conferences involving the Chief Judge of the District and counsel for the parties, a hearing was scheduled for March 1, 1983, on the Governmental Petitioners' motion for a temporary restraining order. During that hearing, a full opportunity to present witnesses and conduct cross-examination was afforded both sides. By memorandum and order issued the next day, on March 2, 1983, the District Court granted the Govern-

mental Petitioners the temporary restraining order (Appendix 30a-36a). The effect of the District Court's order was to halt the conduct complained of by the Governmental Petitioners in their antitrust complaint: the dismantlement of a unique and critical rail line between Scranton, Pa. and Hoboken, New Jersey (hereinafter, "Lackawanna Main Line"). The District Court's March 2 order was given a duration of ten days and provided, in pertinent part:

> Consolidated Rail Corporation be and hereby is restrained from dismantling or removing the Lackawanna Main Line running between Hoboken, New Jersey, and Scranton, Pennsylvania.

A motion for extension of the temporary restraining order was filed March 10, 1983. In subsequent discussions and at the suggestion of the Chief Judge, the understanding that no further dismantlement would take place on the Lackawanna Main Line was continued, and the motion to extend the temporary restraining order remains pending.

The Governmental Petitioners filed objections in the Railroad Court to Conrail's complaint on March 4, 1983 (Appendix 37a). A motion to dismiss Conrail's complaint was also made of record. In these objections and the motion, the Governmental Petitioners asserted, inter alia, that the Railroad Court was without power to enjoin the District Court from proceeding with an adjudication of the antitrust claim, and further that the antitrust claim was not within the Railroad Court's exclusive jurisdiction.

Also on March 4, 1983, the Railroad Court set argument on Conrail's motion for a preliminary injunction and declaratory judgment for March 11 (Appendix 42a). At argument, counsel for Conrail admitted that the necessary consequence of Conrail's jurisdictional argument was that the antitrust claims would be heard both by the Railroad Court (with respect to injunctive relief), and the District Court (with respect to any claim for damages) (Appendix 45a). The identical admission had been made informally in a conference before the District Court. Also at the argument, counsel for the Governmental Petitioners noted repeatedly that no evidentiary hearing was being conducted (Appendix 46a-49a).

On March 14, 1983, Conrail having failed to answer or otherwise respond to the amended complaint in the District Court, the Governmental Petitioners requested an entry of default against Conrail. On March 15, 1983, Conrail belatedly filed its answer to the amended complaint in the District Court, raising, inter alia, the lack of subject matter jurisdiction—the same assertion with respect to the jurisdiction of the District Court being asserted affirmatively in the collateral Railroad Court action (Appendix 50a). Conrail's contention that the District Court lacked subject matter jurisdiction was not in any other fashion asserted in the District Court but was instead pressed by Conrail only in the collateral proceedings before the Railroad Court.

On March 31, 1983, notwithstanding the pendency in the District Court of the antitrust action and the motion for an extension of the temporary restraining

order, the Railroad Court acted without holding an evidentiary hearing or trial, without affording Governmental Petitioners the opportunity to file a responsive pleading, without issuing further order or notice of any kind, and without providing any citation to applicable case law, not only granting Conrail's motion for a preliminary injunction, but entering a final order adjudicating the matter. In that order the Railroad Court has permanently enjoined the Governmental Petitioners from proceeding with their antitrust action in the District Court for injunctive relief (Appendix 63a). A stay of the order was sought on April 5, 1983, and was denied on April 8, 1983 (Appendix 65a).

The antitrust action was instituted by Monroe County, a municipality within the Commonwealth of Pennsylvania located along the Lackawanna Main Line between Scranton, Pa. and Hoboken, New Jersey. The Monroe County Railroad Authority has a proprietary interest in the acquisition of the line Conrail is attempting to dismantle (Appendix 30a-34a). As stated by the District Court:

> The plaintiffs assert that the defendant Conrail is attempting to eliminate the Lackawanna Main Line "in favor of other lines it controls, including the Lehigh Valley Railroad Line." *See* Complaint at ¶16. According to the complaint, Conrail has attempted to phase out the Lackawanna Line in such a manner as to ensure that no entity will be able to assume possession and control of the line and to offer competition to Conrail's Lehigh Valley Line. Specifically, the plaintiffs allege that Conrail has begun a program of

> selective abandonment using the Regional Rail Reorganization Act of 1973, as amended, 45 U.S.C.A. §701 *et. seq.* (West Supp. 1982), whereby various discrete segments of the Line will be abandoned in order to make resale of these portions of the track manifestly unattractive. The plaintiffs assert that this carving up of the Line, and now the removal of portions of the track, denies them the opportunity to join with "other interested persons" into a venture to acquire all or part of this Line, and eventually to compete with the Lehigh Valley Line owned by Conrail. Conrail's conduct, it is alleged, is an attempt to monopolize the rail service industry, or, perhaps more accurately, to maintain an already existing monopoly. *See* Sherman Act §2, 15 U.S.C. §2. Hence, the plaintiffs invoke section 16 of the Clayton Act as the authority on which to base their entitlement to injunctive relief.

(Appendix 31a-32a). The segmenting of the Lackawanna Main Line was never considered by any administrative agency, is unregulated by any statutory provision, and permitted Conrail to accomplish an anti-competitive purpose: the de facto preclusion of acquisition of this particular business asset by Conrail's competitors or potential competitors. The disposing of certain segments of the Line is part of a plan Conrail has to enhance other lines, such as the Lehigh Valley Line, thereby gaining for Conrail additional competitive advantage and further entrenchment of its monopolistic position.

An intermediate step in the process of segmenting and eliminating the Lackawanna Main Line was a procedure known as "abandonment". As provided in Section 308 of the Regional Rail Reorganization Act of 1973 (3 R Act), as added by Section 1156 of the Northeast Rail Service Act of 1981 (NRSA), 45 U.S.C. §748, Conrail was allowed to submit "an application for a certificate of abandonment for any line which is part of the system of the Corporation," i.e. Conrail. The Interstate Commerce Commission, to whom Conrail submitted applications for abandonment of particular segments of the Line, made no review beyond that necessary to make, in the words of counsel for Conrail before the District Court, a "numerical conclusion" as to a "liquidation value". The amended complaint, liberally construed, alleges that Conrail used the administrative process, in effect, as a camouflage for its anti-competitive intentions. By directing attention toward the process of determining a "liquidation value" for particular segments of the Lackawanna Main Line, Conrail succeeded in delayng the realization on the part of its competitors and potential competitors that the Lackawanna Main Line was being lost as a means of competing with Conrail and its vast remaining assets.

Once the process from segmenting through dismantlement has been completed for *any single segment* on the Lackawanna Main Line, the means of competing with Conrail's Lehigh Valley Line for east-west rail traffic into and out of the Metropolitan New York Area would be lost. Consequently, the Governmental Petitioners instituted the antitrust action in the

District Court, seeking injunctive relief for the prospective and imminent harm to their competitive and proprietary interests.

At the hearing on the motion for a temporary restraining order held by the District Court on March 1, 1983, the Governmental Petitioners adduced evidence establishing unequivocally that irreparable injury would occur without the issuance of a temporary restraining order by the District Court. As explained by the District Court in its March 2 memorandum and order:

> If the [temporary restraining] order is not granted, plaintiffs would suffer immediate and irreparable injury in that the subject rail line's right of way is unique—once the tracks are removed, some easement rights may revert back to the original owners and cannot be replaced; removal of the spikes would necessitate realignment of the rails; if the rails were removed and plaintiffs ultimately prevail, the cost of relaying the rails would be prohibitive, estimated by Edson Tennyson as approximately $500,000 per mile, and plaintiffs would encounter immeasurable delay in entering the market while the rails were replaced. The evidence adduced at the hearing clearly points to the furtherance of the public interest if the order is granted. Denial of the temporary restraining order would result in damage to the economic and social development of the regions adjacent to the subject rail lines.

(Appendix 34a-35a). The evidence at the hearing established that Conrail's benefit in net salvage value

per mile of track was only in the approximate range of $10,000 to $20,000, as compared with the $500,000 per mile required to re-lay the rails once the track was dismantled. There was also evidence presented at the hearing from which the District Court could conclude that salvage from other tracks could be used in place of the trackage that Conrail would obtain from the dismantlement of the Line. The District Court concluded that "no evidence of harm to Conrail should the order issue was presented." The District Court also concluded on the basis of all the information available to it that there was a "sufficient likelihood of success"* in order "to sustain the issuance of a temporary restraining order, inasmuch as consideration of the other factors so strongly favors the granting of said order".

By way of contrast with the careful and measured processes in the District Court, in which a full opportunity was afforded both sides for the presentation of evidence and argument, the Railroad Court at argument on the Conrail's motion for preliminary injunction and declaratory judgment failed to heed the note taken by counsel for the Governmental Petitioners that an evidentiary hearing would be required before rulings in Conrail's favor could be made.

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* In addition to the verified allegations of the amended complaint, the District Court had before it prior to the hearing on March 1, 1983, the affidavits of a number of individuals, including the affidavit of Philip A. Lieberman, which, in considerable detail, substantiated the contention that the segmenting of the Lackawanna Main Line was done deliberately to "prevent competition on that line...." (Appendix 68a).

Conrail failed to present, and therefore the Railroad Court did not have before it, any evidence establishing irreparable injury to Conrail if a preliminary injunction were denied and the Governmental Petitioners were allowed to proceed before the District Court with the antitrust action. Indeed, the District Court found precisely to the contrary: no harm would befall Conrail if the District Court's temporary restraining order was issued, while irreparable injury would befall the Governmental Petitioners were the dismantlement of the Lackawanna Main Line allowed to continue.

REASONS WHY CERTIORARI SHOULD BE GRANTED

Certiorari should be granted because resort to this Court is the only means to redress and correct the erroneous rulings of the Railroad Court. Title 45 U.S.C. §1105(b) provides for a review on direct appeal to this Court in narrow circumstances, not applicable here, and for review on writ or certiorari otherwise. Because there is no appeal provided to any other court, such as a court of appeals, this Court is both the last and only resort for the Governmental Petitioners. The significance of the fact that review of the Railroad Court occurs, with only minor exception, on certiorari, is further heightened by the nature of the Railroad Court's ruling, which appears to be without precedent in the annals of American jurisprudence.

1.

The Governmental Petitioners cannot properly be made to pursue injunctive relief on their antitrust claim in one court and damage relief on their antitrust claim in another, thereby requiring a single antitrust claim to be proved in two separate proceedings.

Perhaps the most bizarre aspect of the Railroad Court's decision is the notion, suggested by counsel for Conrail and adopted by the Railroad Court, that

somehow an antitrust claim must be heard in two separate courts to afford full relief to the Governmental Petitioners. The Railroad Court concluded that its "jurisdiction is not triggered by the label of a civil action, but by the type of relief sought" (Appendix 63a). The Railroad Court determined that an antitrust claim seeking injunctive relief with the potential for "significantly affecting" implementation of NRSA must be brought before the Railroad Court, while an action for damages on the same claim would be brought in the District Court.

The Railroad Court's conclusion that complete relief on a single antitrust claim can be afforded only by separate courts is a conclusion in direct contravention of the unity of proceedings established by Federal Rule of Civil Procedure 2. By its literal terms, Rule 2 provides simply that: "There shall be one form of action to be known as 'civil action.' " As noted by distinguished commentators,

> the merger of law and equity and the abolition of the forms of action furnish a single uniform procedure by which a litigant may present his claim in an orderly manner to a court empowered to give him whatever relief is appropriate and just....

4 C. Wright & A. Miller, Federal Practice & Procedure, *Civil* §1043 (1969). A limitation on the remedies that a court with jurisdiction can provide to a litigant is wholly inappropriate under the Rules of Civil Procedure. Moreover, the notion that different forms of relief are available before different federal courts is one at odds with accepted jurisprudential

principles. Bifurcated litigation is not favored in the federal system. *See Oljato Chapter of Navajo Tribe v. Train*, 515 F.2d 654 (D.C.Cir. 1975), *citing*, *Foti v. Immigration and Naturalization Service*, 375 U.S. 217 (1963). Indeed, it is the policy of the federal courts to avoid duplicative litigation, not create circumstances where the same claim must be proved twice to afford to a litigant full relief. *See Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). *See also Kewanee Oil Company v. M&T Chemicals, Inc.*, 315 F. Supp. 652 (D.Del. 1970) (common issues should not proceed simultaneously in two courts); *In re Plumbing Fixture Cases*, 298 F. Supp. 484 (J.P.M.D.L. 1968) (nine cases should be transferred for pretrial proceedings and heard with other cases already transferred).

Counsel knows of no decision in which it was held that relief in an antitrust case could be had only by resort to two courts.

2.

The District Court does not lack jurisdiction over the cause of action asserted by the Governmental Petitioners in the amended complaint in the antitrust action.

The second reason for granting the petition for certiorari is the very basic fact that the District Court has jurisdiction over the antitrust claim in the amended complaint filed by the Governmental Petitioners.

Because of the District Court's jurisdiction, the order of the Railroad Court enjoining the Governmental Petitioners from proceeding before the District Court is improper. The District Court's jurisdiction arises of course from the provisions of 28 U.C.S. §1337(a), providing to all district courts original jurisdiction over "any civil action or proceeding arising under any Act of Congress ... protecting trade and commerce against restraints and monopolies...." Allegations of antitrust violations have been made and supported and a temporary restraining order has been issued by the District Court. The Governmental Petitioners' claim stated in the amended complaint is not dependent upon establishing any violation by the Railroad of either the 3 R Act or NRSA, but is rather dependent upon proof the antitrust laws have been violated by Conrail.

The Railroad Court was established by Congress subsequent to the enactment of the antitrust laws, of course. Antitrust liability was expressly preserved under the same statutes that created the Railroad Court. *See* Section 601 of the 3 R Act, 45 U.S.C.S. §791. However, the Railroad Court was not given jurisdiction over antitrust claims. Neither is the District Court divested of antitrust jurisdiction by the existence of a pervasive administrative scheme, as Conrail would suggest. *See Otter Tail Power Company v. United States*, 410 U.S. 366 (1973); *Atchison, Topeka & Santa Fe Ry. Co. v. United States*, 597 F.2d 593 (7th Cir. 1979); *City of Mishakawa v. Indiana and Michigan Electric Co.*, 560 F.2d 1314 (7th Cir. 1977), *cert. denied*, 436 U.S. 922 (1978); *Atchison, Topeka & Santa Fe Ry. Co. v. Aircoach Transp. Ass'n*, 253 F.2d

877 (D.C.Cir. 1958), *cert. denied*, 361 U.S. 930 (1960). Indeed, not only are the administrative actions involved here, however tangentially, not pervasive, there is essentially no administrative oversight of Conrail's actions, no review of the anti-competitive effect of segmenting, and no review of any matter other than that necessary to arrive at the "numerical conclusion" for a "liquidation value."

Conrail argues that the District Court's exercise of its antitrust jurisdiction is improper, basing its argument solely on the existence of Section 1152(a)(1) of NRSA, 45 U.S.C.S. §1105(a)(1), which provides to the Railroad Court exclusive jurisdiction over civil actions "relating to the enforcement, operation, execution or interpretation of any provision of or amendments made by this Act...." The legislative history of the 3 R Act discloses that the Special Court has jurisdiction over "all litigation *directly* relating" to the 3 R Act, 1981 U.S. Code Cong. & Admin. News 629, and by analogy the Special Court only has jurisdiction regarding NRSA if the action "directly relates" to that Act.

In the first instance, it is obvious that the antitrust action in the District Court does not directly relate to the operation of the 3 R Act or NRSA. Were the Governmental Petitioners pursuing contentions that Conrail violated the provisions of the 3 R Act, as amended by NRSA, then such a civil action would directly relate to enforcement or execution of those statutes. The Governmental Petitioners make no such contentions, however, and have not since the filing of the amended complaint.

Reasons Why Certiorari Should Be Granted

Secondly, Conrail's argument proceeds from a basic misunderstanding as to the nature of jurisdictional grants in the federal system. The fallacy of Conrail's argument, and the ruling of the Railroad Court, is that both proceed on the assumption that a matter raisable in defense determines jurisdiction over the cause of action. The District Court's jurisdiction is only dependent upon what is asserted in the cause of action and does not in any way depend upon any proposition of law that may be offered in defense. In other words, where proof of a claim does not require the establishment of a legal proposition, the fact that the proposition will be asserted in the answer is not determinative of jurisdiction for the claim. The cases that support and indeed apply to this proposition are legion.

In *Pan American Petroleum Corp. v. Superior Court of Delaware*, 366 U.S. 656 (1961) (Frankfurter, J.), the petitioners claimed that the federal Natural Gas Act, deprived state courts of jurisdiction to hear contract claims based on prices within the purview of the Act. Federal jurisdiction over the natural gas rates was "exclusive": the United States district courts had exclusive jurisdiction "to enforce any liability or duty created by or to enjoin any violation of this [statute] or any rule, regulation or order thereunder." Without doubt, the contract prices were based upon rates that were or should have been determined in the administrative process. Nonetheless, this Court concluded that the state courts retained jurisdiction over the contract action. The questions of whether state court jurisdiction was ousted did not depend upon "ultimate

substantive issues of federal law. The answers depend upon the particular claim a suitor makes in a state court—on how he casts his action." 366 U.S. at 662. By identical reasoning, the District Court here retains jurisdiction over the antitrust claims, notwithstanding that a portion of Conrail's conduct involved an administrative determination (abandonment) in which liquidation prices were set, and notwithstanding that the jurisdiction of the Railroad Court as to certain matters, other than antitrust, is "exclusive." It was no answer that the petitioners in *Pan American* would assert the defense of invalidity of the rates upon which suit was being brought in the state court.

> We are not called upon to decide the extent to which the Natural Gas Act reinforces or abrogates the private contract rights here in controversy. The fact that Cities Services sues in contract or quasi-contract, not the ultimate validity of its arguments, is decisive.

366 U.S. at 664. Here, Conrail's defense must be heard in the District Court, where there is jurisdiction over the claim that has been stated.

Cases in which there is a defense related to patent matters under 28 U.S.C. §1338 are governed by identical principles. *See Pratt v. Paris Gas Light & Coke Co.*, 168 U.S. 255 (1897). In *Pratt*, the grant of exclusive federal jurisdiction over patents did not preclude state court jurisdiction over a contract claim. Neither did the defense of invalidity of certain patents. There, as here, the assertion that a defense to the claim involves matters within the exclusive jurisdiction of another adjudicatory body does not divest the first

adjudicator of jurisdiction over the claim in question. *See also Geni-Chlor International, Inc. v. Multisonics Development Corp.*, 580 F.2d 981 (9th Cir. 1978). Just as the state courts in *Pan American* and *Pratt* retained jurisdiction over the contract claims notwithstanding exclusive federal jurisdiction over matters raised in defense, so does the District Court here retain jurisdiction over the antitrust claim.

The proper result here, continuation of the District Court's action under the antitrust laws unabated by the Railroad Court's "exclusive" jurisdiction over matters directly relating to the operation of statutes on which *assertion* of the antitrust claim does *not* depend, is in full accordance with sound and well-known jurisdictional principles. The result proffered by Conrail, in which Conrail would defeat jurisdiction of the District Court to decide its own jurisdiction through the institution of a collateral action, is at variance with these principles.

3.

The Railroad Court does not have the power to enjoin a coordinate District Court or the Governmental Petitioners before it from proceeding with an antitrust case for injunctive relief merely on the theory that the District Court is proceeding improperly and without subject matter jurisdiction.

A third reason for the granting of the petition for certiorari is the lack of power in the Railroad Court to

enjoin the District Court. As stated by Judge Learned Hand in *Magnetic Engineering & Mfg. Co. v. Dings Mfg. Co.*, 178 F.2d 866, 869 (2d Cir. 1950):

> We do not believe that our power to protect our own jurisdiction extends to protecting it against the jurisdiction of another federal court of equal jurisdiction or that a suitor has any legally protected interest in having his action tried in any particular federal court, except insofar as the transfer may handicap his presentation of the case, or add to the costs of trial.

As stated more recently in *United States v. Simon*, 373 F.2d 649 (2d Cir.), *vacated as moot, Simon v. Wharton*, 389 U.S. 425 (1967), the issuance of an injunction against proceedings in another court is "fraught with possibilities of conflict between courts." For these reasons, there generally is no power to enjoin proceedings in other jurisdictions, and such power when granted is extraordinary in nature and rarely exercised.

Conrail believes that it has some cognizable interest in having the question of the District Court's subject matter jurisdiction decided in the Railroad Court. The source of this desire on its part is never identified.* Conrail also believes that there is a statutory grant of authority, allowing the Railroad Court to enjoin other proceedings. An examination of this "authority" discloses that no such authority exists.

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[1] The Railroad Court is equivalent to a district court; it has no power of review or supervision over any district court. *See* §209(b), 45 U.S.C. §719(b).

When the 3 R Act was promulgated, the resultant reorganization of bankrupt carriers into Conrail and the conveyance of individual lines to other carriers may have been the largest corporate reorganization in United States history. Congress knew that the railroad reorganization process would be such a vast and difficult undertaking and it gave the Railroad Court extraordinary power under Section 209(g) of the 3 R Act, 45 U.S.C.S. §719(g) (hereinafter, §209), to make sure implementation of this reorganization would progress smoothly: the Railroad Court was given special authority to

> stay or *enjoin any action or proceeding* in any state court or in any court of the United States other than the Supreme Court, if such action or proceeding is contrary to any provision of this Act, impairs the effective implementation of *this Act*, or interferes with the execution of any order of the [Railroad] Court pursuant to this Act.

45 U.S.C.S. §719(g). This special power of §209(g) extended only to matters pertaining to the "Act", i.e. the 3 R Act itself. The reorganization process has long since been completed.

However, when Congress approved NRSA, and notwithstanding that the judicial provisions of Section 1152 of NRSA, 45 U.S.C. §1105, generally tracked the provisions of the judicial section of the 3 R Act's §209, *compare* 45 U.S.C.S. §719(e) *with* 45 U.S.C.S. §1105(a), the Congress in NRSA provided no equivalent to §209(g). Therefore, with respect to "any provision of or amendment made by" NRSA, 45

U.S.C.S. §1105(a)(1), and including the amendment made by §1156 of NRSA to Section 308 of the 3 R Act, 45 U.S.C.S. §748 (the abandonment provisions relied upon so heavily by Conrail), there is no authority in the statute whatsoever to issue an injunction against "any action or proceeding." Can it seriously be disputed that the action of the Railroad Court constitutes an injunction against action by the Governmental Petitioners and a prohibition against proceeding with the District Court antitrust claim? Yet, this is the authority denied by Congress to the Railroad Court with respect to provisions of and amendments made by NRSA.

Conrail's argument before the Railroad Court that it is somehow acceptable to enjoin the parties before a court rather than the court itself is a distinction without a difference in the statute; in either event, whether the injunction is issued against the District Court directly or against the parties on whom the District Court relies in its expeditious and fair consideration and resolution of pending matters before it, such an injunction is still an order having the effect of staying or enjoining "any action or proceeding," a power denied to the Railroad Court in NRSA.

4.

A final adjudication on the complaint in the Railroad Court cannot properly be made without affording the Governmental Petitioners the opportunity to plead, to present evidence and to participate in a trial or hearing.

Finally, there exists a fourth reason why the petition for certiorari should be granted. The action of the Railroad Court in finally adjudicating the merits of Conrail's complaint constitutes an abrogation of even the most elementary principles of law. This Court must correct this outrageous deprivation of the most basic notions of due process. The Railroad Court's final adjudication occurred after the arguments of counsel and without hearing or trial, the taking of evidence, or even the filing of a responsive pleading. The absence of a responsive pleading means that the Railroad Court's precipitous action cannot be viewed as the entry of judgment on the pleadings under Federal Rule of Civil Procedure 12(c); without an answer, the pleadings were incomplete. In any event, Conrail never filed a motion under Rule 12(c). Neither can the action of the Railroad Court be considered a Rule 56 disposition. Not only was no such motion pending at the time, but neither Conrail nor the Governmental Petitioners submitted affidavits and other materials that could have been considered by the Railroad Court. *See* F.R.Civ.P. 56(b) & (f). Even the granting of preliminary relief, for which Conrail had filed a motion, was extremely questionable, since no

evidence was taken by the Railroad Court. The Railroad Court only directed that argument be held. Counsel for the Governmental Petitioners noted respectfully that no evidentiary hearing was in progress on at least three occasions. The lack of evidence in the record precludes a finding that any of the elements for preliminary injunctive relief has been shown. With respect to irreparable injury, this conclusion is perhaps the most obvious. Not only did Conrail introduce no evidence of irreparable injury should dismantlement not proceed, the District Court in considering this issue in the antitrust case found, after hearing and directly to the contrary, that the Governmental Petitioners, and not Conrail, were at risk and would suffer irreparable injury if Conrail proceeded with dismantlement.

The Railroad Court had before it only Conrail's verified complaint and the exhibits thereto, among which were *not* included any of the affidavits submitted by Governmental Petitioners in support of their motion for a temporary restraining order in the District Court. Although Governmental Petitioners urged the Railroad Court to hear evidence, the Railroad Court declined to do so. "In the usual case, a preliminary injunction request will be decided only after the parties have presented testimony in support of their respective positions." 11 C. Wright & A. Miller, Federal Practice and Procedure, *Civil* §2949, at 474 (1973). Where the court determines not to hear evidence, if a conflict in the evidence to be presented appears, the court has abused its discretion in deciding not to receive and consider the evidence. *See Sims v. Greene*, 161 F.2d 87 (3d Cir. 1947).

In this case, there were clear conflicts in the factual assertions of the parties. The Governmental Petitioners had evidence, which they were willing to present, in conflict with any evidence Conrail may have had. The Railroad Court chose not even to review the Governmental Petitioners' affidavits. The Railroad Court's refusal to hold a hearing and failure to consider affidavits was clearly an abuse of discretion which this Court must correct. *See Wounded Knee Legal Defense/Offense Com. v. F.B.I.*, 507 F.2d 1281 (8th Cir. 1974); *K-2 Ski Co. v. Head Ski Co.*, 467 F.2d 1087 (9th Cir. 1972).

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

(s) Morey M. Myers
Morey M. Myers

(s) William W. Warren, Jr.
William W. Warren, Jr.
Attorneys for Petitioners
600 Penn Security
Bank Bldg.
Scranton, PA 18503

Amended Complaint, Civil No. 83-0167

APPENDIX

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

NO. 83-0167

COUNTY OF MONROE, in its own right and on behalf of the Monroe County Railroad Authority; NANCY SHUKAITIS, Chairman, Monroe County Board of Commissioners, in her official capacity; JESSE D. PIERSON, Member, Monroe County Board of Commissioners, in his official capacity; and THOMAS R. JOYCE, Member, Monroe County Board of Commissioners, in his official capacity,
Plaintiffs

v.

CONSOLIDATED RAIL CORPORATION,
Defendant

AMENDED COMPLAINT

1. The plaintiffs bring this action to enjoin the abandonment and removal of track along the main rail line known as the Lackawanna Main Line, and

also as the Scranton-Hoboken Main Line, and specifically 14.6 miles of track from Anolomink to Mount Pocono in Monroe County, Pennsylvania, 1.9 miles from State Line to Slateford in Northampton County, Pennsylvania, and 27.5 miles from Port Morris Junction to State Line in New Jersey.

2. The plaintiffs in this action are the County of Monroe, Nancy Shukaitis, Jesse D. Pierson, and Thomas R. Joyce.

3. The County of Monroe is a sixth-class county, formed under the County Code of the Commonwealth of Pennsylvania. Its principal place of business is at the Monroe County Courthouse, Stroudsburg, Pennsylvania.

4. The County of Monroe brings this action on its own behalf and on behalf of the Monroe County Railroad Authority which is an authority formed under the provisions of the Act of Assembly, approved May 2, 1945, P.L. 382, as amended and supplemented, known as the "Municipality Authorities Act of 1945," for the purposes, inter alia, of acquiring, holding, constructing, improving, maintaining, operating, owning and leasing rights-of-way, trackage, sidings and other related transport facilities.

5. Nancy Shukaitis, plaintiff in this action in her official capacity, is the Chairman of the Board of Commissioners, and maintains her principal place of business at the Monroe County Courthouse, Stroudsburg, Pennsylvania.

6. Jesse D. Pierson, plaintiff in this action in his official capacity, is a Member of the Board of Com-

missioners and maintains his principal place of business at the Monroe County Courthouse, Stroudsburg, Pennsylvania.

7. Thomas R. Joyce, plaintiff in this action in his official capacity, is a Member of the Board of Commissioners and maintains his principal place of business at the Monroe County Courthouse, Stroudsburg, Pennsylvania.

8. The defendant Consolidated Rail Corporation is a Pennsylvania corporation, also maintaining its principal place of business within the Commonwealth. The defendant Consolidated Rail Corporation was created by the Regional Rail Reorganization Act of 1973, 45 U.S.C. §701 et seq., and exists, inter alia, to acquire rail properties, operate rail service over such rail properties, rehabilitate, improve and modernize such rail properties, and maintain adequate and efficient rail services, in accordance with Section 302 of the Regional Rail Reorganization Act of 1973, 45 U.S.C.A. §742 (Supp. 1982).

9. This court has jurisdiction of this cause under 28 U.S.C. §1331 and under 28 U.S.C. §1337, which provide to the district court original jurisdiction of any civil action arising under any Act of Congress protecting trade and commerce against restraints and monopolies.

10. The defendant Consolidated Rail Corporation intends to abandon and liquidate the Lackawanna Main Line, also known as the Scranton-Hoboken Main Line, comprised of several segments, including: (1) 14.6 miles of track from Anolomink to Mt. Pocono in

Monroe County, Pa.; (2) 1.9 miles from State Line to West Slateford in Northampton County, Pa.; and (3) 27.5 miles from Port Morris Junction to State Line in New Jersey.

11. The plaintiffs and defendant Consolidated Rail Corporation agreed on or about February 4, 1983, to limit any action by the defendant, its employees and agents on the Lackawanna Main Line to the removal of rail spikes, commencing on February 7, 1983.

12. The removal of rail spikes, the first step in abandonment and liquidation of the Lackawanna Main Line, has commenced on the third segment identified in paragraph 10 supra, the 27.5 mile section from Port Morris Junction to State Line.

13. On February 9, 1983, the defendant Consolidated Rail Corporation refused to cease the abandonment and liquidation of the Lackawanna Main Line, and advised plaintiffs' representatives of its intention to begin removal of track, rail, and associated equipment from the Lackawanna Main Line after February 11, 1983.

14. Among the purposes of the Regional Rail Reorganization Act of 1973, as amended, 45 U.S.C. §701 et seq. and associated regulations, is the fostering of competition in the rail industry.

15. The duties of the defendant Consolidated Rail Corporation under this Act include the duty to rehabilitate, improve and modernize the railroads.

16. The defendant Consolidated Rail Corporation desires to eliminate the Lackawanna Main Line in

favor of other lines it controls, including the Lehigh Valley Railroad Line.

17. To eliminate the Lackawanna Main Line, the defendant Consolidated Rail Corporation has divided up the Lackawanna Main Line into segments and inflated the liquidation price of the Line and its segments, thereby affecting the price at which the Lackawanna Main Line could be purchased.

18. By dividing the Lackawanna Main Line into segments, the defendant has effectively forestalled any purchase of the Line to date.

19. By dividing the Lackawanna Main Line into segments, Conrail has proceeded along its course to eliminate the Line as a viable rail corridor for the movement of freight and passengers.

20. By dividing the Lackawanna Main Line into segments, the defendant has caused different statutory periods to run at different times, so that the abandonment and liquidation of one segment could be accomplished before proper notice has been given with respect to other segments, in violation of the intent of the Regional Rail Reorganization Act of 1973, as amended, and as a means of furthering the defendant's intention to eliminate the Lackawanna Main Line.

21. The plaintiffs and other persons desire to purchase all or part of the Lackawanna Main Line.

22. The plaintiffs and other interested persons have been denied the opportunity to purchase all or part of the Lackawanna Main Line by the conduct of the defendant.

23. If the plaintiffs and other interested persons are denied the opportunity to purchase all or part of the Lackawanna Main Line, there will be a restraint of trade.

24. The defendant Consolidated Rail Corporation ships or has shipped goods in interstate commerce, and specifically over the Lackawanna Main Line and alternate rail lines, including the Lehigh Valley Railroad Line, running from Metropolitan New York and adjacent New Jersey to Allentown and Sayre, Pennsylvania.

25. Goods in interstate commerce can be shipped over either the Lackawanna Main Line or the Lehigh Valley Railroad Line, which lines serve same geographic market.

26. The intended action of the defendant Consolidated Rail Corporation in abandoning and liquidating the Lackawanna Main Line and the result of such action will prevent the plaintiffs and other interested persons from operating rail service over the Lackawanna Main Line in competition with the Lehigh Valley Railroad Line.

27. The effect of the abandonment and liquidation of the Lackawanna Main Line will be to reduce and eliminate competition in the movement of goods in the relevant geographic market and will tend to create and establish a monopoly in restraint of trade.

28. In the conduct and operation of the defendant's rail properties, the defendant has had and continues to have a substantial impact on interstate commerce.

29. The abandonment and liquidation of the Lackawanna Main Line will result in substantial lessening of competition and will have a substantial impact on interstate commerce.

30. The defendant Consolidated Rail Corporation controls the interstate shipment of goods between the markets in the New York Metropolitan Area, including adjacent New Jersey and specifically Hoboken, New Jersey, and Northeastern Pennsylvania, specifically including the Scranton-Allentown area.

31. The defendant Consolidated Rail Corporation, by abandoning and liquidating the Lackawanna Main Line is attempting to monopolize commerce to its own benefit as the operator of the Lehigh Valley Rail Line, and to the detriment of competition in the movement of goods in interstate commerce, all in violation of Section 2 of the Sherman Act, 15 U.S.C. §2.

WHEREFORE, the plaintiffs respectfully request the court to adjudge and decree that the defendant Consolidated Rail Corporation has violated Section 2 of the Sherman Act, and preliminarily and permanently enjoin the defendant Consolidated Rail Corporation from abandoning and liquidating the Lackawanna Main Line, also known as the Scranton-Hoboken Main Line, or any segment thereof, and to award such further and other relief as the court deems proper and just, and to award the plaintiffs the cost of this suit, including reasonable attorney's fees.

Amended Complaint, Civil No. 83-0167

GELB, MYERS, BISHOP & WARREN
by (s) Morey M. Myers
Morey M. Myers
by (s) William W. Warren, Jr.
William W. Warren, Jr.
by (s) Jill H. Miller
Jill H. Miller
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Of counsel:
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Stroudsburg, PA 18360

Commonwealth of Pennsylvania:
: ss.
County of Lackawanna :

I, William W. Warren, Jr., being duly sworn according to law, depose and say that I have read the foregoing amended complaint and that the facts set forth therein are true and correct to the best of my knowledge, information and belief.

(s) William W. Warren, Jr.
William W. Warren, Jr.

Sworn to and Subscribed
before me this 10th day
of February, 1983
(s) Margaret Decker
Notary Public
Scranton, Lackawanna County, Pa.
My commission expires March 19, 1983

SPECIAL COURT
REGIONAL RAIL REORGANIZATION ACT OF 1973

CA 83-1

CONSOLIDATED RAIL CORPORATION,
Plaintiff,

v.

COUNTY OF MONROE: NANCY SHUKAITAS, Chairman, Monroe County Board of Commissioners, individually and in her official capacity; JESSE D. PIERSON, Member, Monroe County Board of Commissioners, individually and in his official capacity; and THOMAS R. JOYCE, Member, Monroe County Board of Commissioners, individually and in his official capacity,
Defendants.

PRECIS: COMPLAINT OF CONSOLIDATED RAIL CORPORATION FOR INJUNCTIVE AND DECLARATORY RELIEF

Consolidated Rail Corporation ("Conrail") makes the following Complaint against defendants and seeks injunctive relief, a declaratory judgment and such other relief as may be appropriate.

JURISDICTION

1. The jurisdiction of this Court is invoked pursuant to § 209(g) of the Regional Rail Reorganization Act of 1973 ("3-R Act"), as amended, 45 U.S.C. § 719(g) and § 1152 of the Northeast Rail Service Act of 1981 ("NERSA"). 45 U.S.C. § 1105. This is an action in equity, authorized by law, to preserve the original and exclusive jurisdiction of this Court over civil actions relating to the enforcement, operation, execution, or interpretation of a provision of the NERSA, and administrative action taken thereunder. In particular, this action seeks relief to prevent defendants from delaying and interfering with Conrail's program to achieve viability by implementing its abandonment of rail line pursuant to § 308 of the 3-R Act, as added by § 1156 of NERSA.

THE PARTIES

2. Plaintiff Conrail was created pursuant to the 3-R Act, Pub. L. 93-236, Title III, § 301, 87 Stat. 1004 (1974), as amended 45 U.S.C. § 741, and was duly incorporated in the Commonwealth of Pennsylvania.

3. Defendant County of Monroe is a sixth-class county, formed under the County Code of the Commonwealth of Pennsylvania. Its principal place of business is at the Monroe County Courthouse, Stroudsburg, Pennsylvania.

4. Defendant Nancy Shukaitas is the Chairman of the Board of Commissioners of the County of Monroe.

5. Defendant Jesse D. Pierson is a Member of the Board of Commissioners of the County of Monroe.

6. Defendant Thomas R. Joyce is a Member of the Board of Commissioners of the County of Monroe.

CAUSE OF ACTION

a. *The Pertinent Legislation*

7. As part of its comprehensive effort to make Conrail viable and to assure achievement of the objectives which Congress established in the 3-R Act, Congress enacted the Northeast Rail Service Act of 1981 ("NERSA") (Subtitle E of Title XI of the Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35). Section 1156 of NERSA amended the 3-R Act to add § 308, 45 U.S.C.A. § 748 (West Supp. 1982) (hereafter referred to as § 308).

8. Section 308, 45 U.S.C. § 748, reads, in pertinent part, as follows:

> "(a) General. The Corporation [*i.e.* Conrail] may, in accordance with this section, file with the Commission an application for a certificate of abandonment for any line which is part of the system of the Corporation ...
>
> "(b) Applications for Abandonments. *Any application for abandonment* that is filed by the Corporation under this section before December 1, 1981, *shall be granted by the Commission within 90 days after the date such application is filed unless, within such 90-day period, an offer of financial assistance is made in accordance with subsection (d) of this section* with respect to the line to the abandoned.... [Emphasis added.]

* * * *

"(d) Offers of Financial Assistance. (1) The provisions of § 10905(d)-(f) of title 49, United States Code [49 U.S.C.S. § 10905(d)-(f)] (including the timing requirements of subsection (d) thereof), shall apply to any offer of financial assistance under subsection (b) or (c) of this section....

"(e) Liquidation. (1) If any application for abandonment is granted under subsection (b) of this section, the Commission shall, as soon as practicable, appraise the net liquidation value of the line to be abandoned, and shall publish notice of such appraisal in the Federal Register.... (3)(A) If, within 120 days after the date on which an appraisal is published in the Federal Register under paragraph (1), the Corporation receives a bona fide offer for the sale, for 75 percent of the amount at which the liquidation value of such line was appraised by the Commission, of the line to be abandoned, the Corporation shall sell such line.... (B) If the Corporation receives no bona fide offer under subparagraph (A), within such 120-day period, the Corporation may abandon or dispose of the line as it chooses."

9. Section 308 establishes an abandonment procedure which is different from, and more expeditious and subject to fewer limitations than, the abandonment procedure set forth in 49 U.C.S. § 10901, *et seq.* which must be followed by other railroads. In particular, abandonment applications under § 308 are not subject to protest, investigation and review. An ap-

plication for abandonment may be denied only in certain circumstances, as more particularly set forth above and as described in paragraph 10.

10. Section 308 permits persons who desire to assure continued rail service over a line as to which an application to abandon has been filed to submit an "offer of financial assistance" to purchase or subsidize operation of the line within 90 days after the filing of the abandonment application. The procedures governing such offers are set forth in 49 U.S.C. § 10905(d)-(f) (Supp. III 1979), as incorporated by reference in § 308(d). Section 308 requires the ICC to grant a Conrail abandonment application if an offer of financial assistance is not timely filed. Also, if such an offer is made and subsequently is withdrawn, abandonment must be approved by the ICC. Section 308(e) also provides for the purchase, at a discounted price, of rail lines by interested parties after an order for abandonment has been issued and during a period of 120 days after publication in the Federal Register of the ICC's appraisal of the net liquidation value. If no offer to purchase is received during the 120-day period, abandonment and liquidation may be effectuated by Conrail.

b. *Proceedings Under § 308 to Abandon Portions of the Scranton Line*

11. Almost immediately after the enactment of NERSA, Conrail began a major program of line abandonment as part of its efforts to fulfill the Congressional mandate that it become a viable rail system. In October 1981 Conrail prepared, published and widely distributed a map and a list of lines which Conrail ex-

pected to process for abandonment under NERSA. Among the more than 2,000 miles of line so identified were the following segments of the line between Scranton, Pennsylvania and Hoboken, New Jersey ("Scranton Line"):

Terminus	*Terminus*	*Length*
Port Morris Junction, N.J.	State Line, N.J.	27.5 miles
State Line, Pa.	Slateford, Pa.	1.9 miles
Analomink, Pa.	Mt. Pocono, Pa.	15.8 miles

None of these segments have been in use for approximately a year.

12. Pursuant to its abandonment program under NERSA, between September 2 and November 30, 1981, Conrail filed 311 applications under § 308, covering more than 2600 miles of rail line. On November 30, 1981, Conrail filed three applications with the ICC under § 308 for approval of the abandonment of the three segments of the Scranton Line identified in paragraph 11.

i. *The New Jersey Segment*

13. With respect to the proposed abandonment of the Port Morris-State Line segment in New Jersey, no offer of financial assistance was tendered by anyone. Accordingly, by its decision in Docket No. AB-167 (Sub No. 280N) dated February 24, 1982 and served March 11, 1982, the ICC approved this application and granted a certificate of abandonment. A copy of the Certificate and Decision is attached to the complaint as Exhibit A.

14. On July 29, 1982, notice was published in the Federal Register stating that the net liquidation value of the Port Morris-State Line segment is $2,310,601. 47 Fed. Reg. § 2803. A copy of the notice is attached to the complaint as Exhibit B. Under § 308(e), Conrail was thereupon required to maintain the physical integrity of the line for a period of 120 days, during which time persons wishing to purchase the line for continued rail operations could submit offers to purchase at 75% of the published net liquidation value.

15. No offers to purchase were tendered by defendants or anyone else during the 120-day period, and, under § 308(e)(3)(B), Conrail became free on and after November 26, 1982, to abandon and dismantle the rail line between Port Morris and the New Jersey State Line.

16. On February 1, 1983, Conrail began to dismantle the New Jersey segment. To perform this work, Conrail rehired 15 furloughed employees who were then out of work and assigned them to commence by removing the spikes from this line. The next step would be to remove the rails which were needed in Conrail's comprehensive program to replace rails on other lines on the system which were to be rehabilitated by Conrail during 1983.

ii. *The Pennsylvania Segments*

17. With respect to the applications seeking approval to abandon the two other segments of the Scranton Line, namely from the Pennsylvania State line to Slateford and from Analomink (West Gravel

Place) to Mt. Pocono, offers of financial assistance were filed jointly on February 28, 1982 as to both two segments by Pocono Northeast Railroad and Monroe County. The offerors and Conrail were unable to reach agreement on price, and the ICC was requested to establish the sale price and other terms and conditions of the sale. The ICC, on May 28, 1982, acting pursuant to certain paragraphs of 49 U.S.C. § 10905 which are incorporated by reference in § 308, established sale prices for these two segments.

18. On June 17, 1982, the offerors withdrew their offers of financial assistance to purchase these two segments of the Scranton Line and stated to the ICC that they "intend to pursue acquisition of these lines pursuant to the discount purchase provisions established by section 1156 of the Northeast Rail Service Act of 1981." The letter of the offerors to the ICC, dated June 17, 1982, is attached to the complaint as Exhibit C.

19. Thereafter, by orders served July 7, 1982, the ICC approved abandonment of the State Line-Slateford and Analomink-Mt. Pocono lines, as it had earlier done with respect to the Port Morris-State Line segment. As required by the statute, the ICC thereafter, on October 26, 1982 and October 29, 1982, respectively, published the net liquidation value of these two Pennsylvania Segments of the Scranton Line in the Federal Register. 47 Fed. Reg. 47479, 49095. The net liquidation values were established as § 119,-303 and § 1,691,974, respectively. Copies of the Federal Register notice of findings are attached to the complaint as Exhibits D and E. However, no offers to

purchase these lines at 75% of net liquidation value as authorized by § 308(e)(3)(A) have been tendered by anyone including offerors, despite the intention earlier expressed in their letter of June 17, 1982 (Exhibit C). The 120-day periods during which purchase at 75% of net liquidation value is available for these Pennsylvania segments expire on February 23 and 26, 1983, respectively.

20. Conrail did not file applications to abandon the Slateford-Analomink segment of the Scranton Line because it determined that this segment, which is linked to another Conrail line from Allentown, was making an adequate financial contribution to the system.

c. *The Action by Monroe County*

21. On February 8, 1983, the County government and three Commissioners of Monroe County, Pennsylvania, through which Conrail's Scranton Line passes, filed a complaint in the United States District Court for the Middle District of Pennsylvania, docketed, as No. CV-83-0167, seeking preliminary and permanent injunctive relief to prevent the abandonment by Conrail of the Scranton Line or any segment thereof. A copy of this initial complaint is attached hereto as Exhibit F.

22. In their initial complaint, complainants asserted that Conrail had commenced abandonment of the Port Morris-State Line section of the Scranton line without giving them the 30-days' notice allegedly required in § 304(b) of the Regional Rail Reorganization Act of 1973, as amended, 45 U.S.C.A. §744(b) (Supp.

1982). The complaint alleged that the 120-day notice was not given until October 29, 1982, and that the period of submission of offers to purchase had not expired. The plaintiffs further alleged that because Conrail has improperly begun abandonment they have been denied the opportunity to purchase the line. The complaint also purported to assert a claim under the antitrust laws based upon the contention that, since Conrail operated two lines in the area, Conrail's abandonment and liquidation of the one Scranton Line would eliminate the possibility of competition over that line and would leave Conrail in a monopoly position. The plaintiffs requested findings that Conrail had violated the Rail Reorganization Act of 1973 and Section 2 of the Sherman Act, and asked the court to enjoin Conrail from abandoning and liquidating the line.

23. Conrail promptly advised Monroe County's counsel that the United States District court for the Middle District of Pennsylvania lacked jurisdiction over its complaint, and further advised counsel for the County that Conrail intended to commence an action in the Special Court to enjoin Monroe County from proceeding with its action in the Middle District of Pennsylvania. Thereafter, on February 10, 1983, Monroe County filed an amended complaint. In its amended complaint (a copy of which is attached hereto as Exhibit G), Monroe County withdrew all of its allegations asserted in their original complaint with the exception of the purported antitrust claim. Monroe County alleges in its amended complaint that Conrail's abandonment under § 308 violates Section 2 of the Sherman Act, 1 U.S.C. § 2, and it seeks an injunction

to prevent Conrail from abandoning the line of railroad authorized by the ICC to be abandoned.

24. On February 19, 1983, a conference was held in the Middle District of Pennsylvania before the Honorable William J. Nealon, Chief Judge, concerning the amended complaint of Monroe County. At that conference, counsel for Conrail informed Chief Judge Nealon and attorneys for Monroe County that (a) the amended complaint raised issues calling for relief that was within the exclusive jurisdiction of the Special Court; (b) that the claim of Conrail's purported violation of the antitrust laws was a sham designed to avoid the jurisdiction of the Special Court: (c) that the County of Monroe lacked standing to assert its claim; (d) and that Conrail intended to seek appropriate relief from the Special Court. Chief Judge Nealon thereupon suspended the hearing set for February 22, 1983, regarding Monroe County's motion for a temporary restraining order and preliminary injunctive relief, and rescheduled that hearing for March 1, 1983. Unless this Court first acts to assert its jurisdiction in this cause, the action in the Middle District of Pennsylvania will be heard on that date.

25. Plaintiff Conrail avers that Conrail has followed and complied with all of the procedures under § 308 of the 3-R Act for acquiring approval and authority to abandon the three segments of the Scranton Line identified in paragraph 11; that Conrail is not required by law to offer the Scranton Line for sale to Monroe County; and that it is not required by law to sell any segments of the Scranton Line other than in accordance with the provisions of § 308. Conrail fur-

ther avers that Monroe County has filed its purported antitrust claim in the Middle District of Pennsylvania in an effort to obtain an injunction against Conrail's abandonment of the aforesaid rail segments and to thwart and evade the jurisdiction of the Special Court and to force Conrail to sell the aforesaid segments of the Scranton Line or the entire line at a price far below the value established under § 308.

26. The relief here sought to enjoin Monroe County and its Commissioners from seeking to enjoin Conrail's abandonment of segments of the Scranton Line, and in particular the Port Morris-State Line segment of that line, is within the original and exclusive jurisdiction of this Court under § 1152(a) of NERSA.

WHEREFORE, Plaintiff respectfully prays that this Court advance this case to a speedy hearing at the earliest practicable date, and upon such hearing enter a declaratory judgment and a preliminary and permanent injunction:

(1) Declaring that the Special Court has original and exclusive jurisdiction over the claim for relief asserted by Conrail in this action; and

(2) Enjoining defendants and their counsel from taking any action in *County of Monroe, et al. v. Consolidated Rail Corporation*, M.D. Pa., No. CV-83-0167, or in any other lawsuit which seeks to enjoin or interfere with the abandonment and dismantling by Consolidated Rail Corporation of the Port Morris-State Line segment or any other segments of the Scranton Line pursuant to § 308 of the Railroad Reorganization Act of 1973, as amended, and the orders of the In-

terstate Commerce Commission, and from taking any action in any court seeking relief inconsistent therewith.

FURTHER, plaintiff prays that this Court grant such further relief as it deems proper, including plaintiff's costs in this action.

(s) Jerome J. Shestack
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1038 Six Penn Center Plaza
Philadelphia, Pennsylvania 19103
Of Counsel.

Complaint, C.A. 83-1

Commonwealth of Pennsylvania:
: SS.
County of Philadelphia :

AFFIDAVIT

CHARLES E. MECHEM, being duly sworn according to law, deposes and says that:

1. He is General Attorney of Consolidated Rail Corporation, plaintiff in this action, with offices at Six Penn Center Plaza, Philadelphia, Pennsylvania, 19103.

2. He is authorized to execute this affidavit on behalf of plaintiff.

3. That he has read the foregoing complaint, and that the facts set forth therein are true and correct to the best of his knowledge, information and belief.

(s) Charles E. Mechem

Sworn to and subscribed
before me this 21st day
of February, 198 .
(s) Ann Marie Watts
Notary Public

Ann Marie Watts
Notary Public, Phila., Phila. Co.
My Commission Expires April 16, 1984

SPECIAL COURT
REGIONAL RAIL REORGANIZATION ACT OF 1973

CA 83-1

CONSOLIDATED RAIL CORPORATION,
Plaintiff,

v.

COUNTY OF MONROE; NANCY SHUKAITAS, Chairman, Monroe County Board of Commissioners, individually and in her official capacity; JESSE D. PIERSON, Member, Monroe County Board of Commissioners, individually and in his official capacity; and THOMAS R. JOYCE, Member, Monroe County Board of Commissioners, individually and in his official capacity,
Defendants.

MOTION FOR PRELIMINARY INJUNCTION AND DECLARATORY JUDGMENT

COMES NOW, plaintiff, Consolidated Rail Corporation ("Conrail"), by its counsel and moves this Court to issue forthwith a Preliminary Injunction pursuant to Rule 65, Federal Rules of Civil Procedure,

and Section 1152 of the Northeast Rail Service Act of 1981, codified at 45 U.S.C. § 1105, enjoining defendants and their counsel from taking any action in furtherance of injunctive relief sought in the suit entitled *County of Monroe, et al. v. Consolidated Rail Corporation*, now pending as Civil Action No. CV-83-0167 in the United States District Court for the Middle District of Pennsylvania. Plaintiff also requests this Court to enter a declaratory judgment. In support of this motion, plaintiff states that:

1. On February 8, 1983, defendants herein (hereafter collectively referred to as Monroe County), filed a complaint with the United States District Court for the Middle District of Pennsylvania, naming plaintiff herein, Conrail, as defendant. That complaint is attached to Conrail's complaint herein as Exhibit F. The aforesaid complaint in No. CV-83-0167 was assigned to the Honorable William J. Nealon, Chief Judge.

2. In its complaint filed February 8, 1983, Monroe County sought to enjoin the abandonment and liquidation under § 308 of the Regional Rail Reorganization Act of 1973, 45 U.S.C. § 748, by Conrail of a rail line between Scranton, Pennsylvania and Hoboken, New Jersey ("Scranton Line") or any segments thereof. Included in Monroe County's request for relief was a 27.5 mile rail line in New Jersey between Port Morris Junction and State Line, abandonment of which had been approved by the Interstate Commerce Commission ("ICC") in Docket No. AB-167 (Sub-No. 280N), effective March 11, 1982. A copy of the ICC's order is attached to Conrail's complaint

herein as Exhibit A. The complaint also sought to enjoin Conrail's abandonment under § 308 of two other segments of the Scranton Line. Counsel for Conrail immediately informed counsel for Monroe County that the claim for relief sought by Monroe County was within the exclusive jurisdiction of the Special Court.

3. On February 10, 1983 plaintiffs filed an amended complaint still seeking to enjoin Conrail's abandonment and liquidation of the Scranton Line or any segment thereof, including the rail line between Port Morris Junction and the New Jersey State Line. In its amended complaint, which is attached to Conrail's complaint herein as Exhibit G, Monroe County alleges that Conrail's abandonment and liquidation of the Port Morris-State Line rail line and other segments of the Scranton Line under § 308 violate Section 2 of The Sherman Act, 15 U.S.C. § 2.

4. Monroe County, defendant herein, as plaintiff in the litigation in the Middle District of Pennsylvania, continues to assert causes of action and to seek relief in that district court that are within the original and exclusive jurisdiction of this Court under § 1152 of the Northeast Rail Service Act of 1981 ("NERSA"), 45 U.S.C.A. § 1105 (West. Supp. 1982).

5. Conrail brings the instant action for preliminary and permanent injunctive relief against prosecution by Monroe County of its suit in the Middle District of Pennsylvania and for declaratory relief establishing and preserving the subject matter jurisdiction of this Court.

6. Section 1152 of NERSA explicitly vests this Court with exclusive jurisdiction over the relief sought

by Monroe County in the suit filed in the Middle District of Pennsylvania. That section also grants to this Court exclusive jurisdiction over the subject matter of this action by Conrail.

7. Failure to enjoin further efforts of Monroe County to obtain injunctive relief against Conrail in the Middle District of Pennsylvania in *County of Monroe, et al. v. Consolidated Rail Corporation* could result in a judgment interpreting and applying provisions of NERSA and directing Conrail to act contrary to ICC action taken thereunder. Such a result would seriously disrupt the orderly procedures established in NERSA and adversely affect the operational efficiency and financial viability of Conrail, contrary to the stated objectives of Congress.

8. The issuance of the requested preliminary injunction and declaratory judgment herein will not materially harm Monroe County.

9. The dominant public interest requires protection of Conrail from interference with its Congressionally-mandated program to establish a self-sustaining railroad system in the Northeast region of the United States.

WHEREFORE, plaintiff Consolidated Rail Corporation moves this Court to issue a preliminary injunction prohibiting defendant County of Monroe (a) from taking any action in *County of Monroe, et al. v. Consolidated Rail Corporation*, M.D. Pa., No. CV-83-0167, or in any other lawsuit which seeks to enjoin or interfere with the abandonment and dismantling by Consolidated Rail Corporation of the Port Morris-State

Line segment or any other segments of the Scranton Line pursuant to § 308 of the Railroad Reorganization Act of 1973, as amended, and the orders of the Interstate Commerce Commission, and (b) from taking any action in any court seeking relief inconsistent therewith.

In accordance with Rule 57, Federal Rules of Civil Procedure, plaintiff Conrail respectfully requests a speedy hearing of its request for a declaratory judgment, and expedited consideration of its motion for preliminary injunction.

Respectfully submitted,
(s) Jerome J. Shestack
Jerome J. Shestack
Robert L. Kendall, Jr.
Attorneys for plaintiff,
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John W. Rowe
Bruce B. Wilson
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1038 Six Penn Center Plaza
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Of Counsel.

Dated: February 22, 1983

Order of Special Court, Feb. 23, 1983

SPECIAL COURT
REGIONAL RAIL REORGANIZATION ACT OF 1973

§1152 Panel
C.A. No. 83-1

CONSOLIDATED RAIL CORPORATION,

Plaintiff,

v.

COUNTY OF MONROE; NANCY SHUKAITAS, Chairman, Monroe County Board of Commissioners, individually and in her official capacity; et al.

Defendants.

ORDER TO SHOW CAUSE WHY CONSOLIDATED RAIL CORPORATION'S MOTION FOR PRELIMINARY INJUNCTION AND DECLARATORY JUDGMENT SHOULD NOT BE GRANTED

Upon consideration that on February 22, 1983, plaintiff Consolidated Rail Corporation filed a motion for preliminary injunction and declaratory judgment and supporting memorandum,

Order of Special Court, Feb. 23, 1983

IT IS ORDERED that any party objecting to the entry of said preliminary injunction and declaratory judgment shall show cause by way of written objections why such proposed preliminary injunction and declaratory judgment should not be entered by the Special Court. Any such written objection shall be filed with the Clerk and served on counsel for Consolidated Rail Corporation no later than March 4, 1983; two copies of any such written objection shall be sent directly to each of the judges on the §1152 Panel of the Special Court; and,

IT IS FURTHER ORDERED that the Court will hear oral argument on plaintiff's motion for preliminary injunction and declaratory judgment and any objections thereto at a time and place to be fixed by further order of the Court.

(s) Oliver Gasch
Oliver Gasch
Presiding Judge

February 23, 1983

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

No. 83-0167 CIVIL

COUNTY OF MONROE, et al.,

Plaintiffs

v.

CONSOLIDATED RAIL CORP.,

Defendant

MEMORANDUM AND ORDER

This matter comes before the court on an application by the plaintiffs for a temporary restraining order. The plaintiffs seek to enjoin the Consolidated Rail Corporation (Conrail) from dismantling and removing various segments of railroad track comprising portions of what is known as the "Lackawanna Main Line." Although not required by governing law, the court has given the defendant an opportunity to be heard at a hearing conducted on March 1, 1983. Both parties having presented evidence and the court having weighed their contentions as set forth below, the

plaintiffs' application for the restraining order will be granted.

Factual Background

The plaintiffs in this action include the County of Monroe, Pennsylvania and three individuals suing in their official capacities as members of the County's Board of Commissioners. The County sues on its own behalf as well as on behalf of the Monroe County Railroad Authority, formed pursuant to Pennsylvania law for the purpose of acquiring and operating railroad properties. The plaintiffs assert that the defendant Conrail is attempting to eliminate the Lackawanna Main Line "in favor of other lines it controls, including the Lehigh Valley Railroad Line." *See* Complaint at ¶ 16. According to the complaint, Conrail has attempted to phase out the Lackawanna Line in such a manner as to ensure that no entity will be able to assume possession and control of the line and to offer competition to Conrail's Lehigh Valley Line. Specifically, the plaintiffs allege that Conrail has begun a program of selective abandonment using the Regional Rail Reorganization Act of 1973, as amended, 45 U.S.C.A. § 701 *et. seq.* (West Supp. 1982), whereby various discrete segments of the Line will be abandoned in order to make resale of these portions of track manifestly unattractive. The plaintiffs assert that this carving up of the Line, and now the removal of portions of the track, denies them the opportunity to join with "other interested persons" into a venture to acquire all or part of this Line, and eventually to compete with the Lehigh Valley Line owned by Conrail. Conrail's conduct, it is alleged, is an attempt to

monopolize the rail service industry, or, perhaps more accurately, to maintain an already existing monopoly. *See* Sherman Act § 2, 15 U.S.C. § 2. Hence, the plaintiffs invoke section 16 of the Clayton Act as the authority on which to base their entitlement to injunctive relief.

The first issue[1] raised by the defendant concerns the doctrine of standing. Because some paragraphs of the complaint, as well as the affidavits submitted, focus upon the economic development of Monroe County and the adverse effects to its citizenry if the Lackawanna Line does not remain viable, the defendant asserts that the plaintiff is attempting to bring this action as *parens patriae*. Since Monroe County is not a "sovereign," and gains its status as a political subdivision derivatively from the Commonwealth of Pennsylvania, a *parens patriae* argument must fail. *See, e.g., City of Rohnert Park v. Harris*, 601 F.2d 1040, 1044 (9th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980); *In Re Multidistrict Vehicle Air Pollution, M.D.L. No. 31*, 481 F.2d 122, 131 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973).

After carefully examining the complaint and the affidavits, however, the Court concludes that Monroe

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[1] A substantial analysis of the jurisdictional question has not been made inasmuch as that issue has been presented to the Special Railroad Court established by the Regional Rail Reorganization Act, *see* 45 U.S.C.A. § 719 (Supp. 1982). I understand that the Special Court has placed the matter on an expedited briefing schedule. In deference to that court and so as not to interfere with its determination, I will not decide the question beyond noting that I have jurisdiction to issue a TRO.

County also has asserted a claim that Conrail is threatening to injure *proprietary*, not only governmental or derivative, interests. *See* 601 F.2d at 1044; *cf. American Motorcyclist Assn. v. Watt*, 534 F. Supp. 923, 931-32 (C.D.Cal. 1981) (applying Article III standing principles). Essentially, the complaint sets forth a claim that the County wishes to enter this market as Conrail's competitor, and that Conrail's anticompetitive conduct is barring that entry. At least one court has observed that "in order to have antitrust standing ...it is sufficient if [a party] has manifested an intention to enter the business and has demonstrated his preparedness to do so." *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 987 (D.C.Cir. 1977), *cert. denied*, 436 U.S. 956 (1978). Although Conrail argues that Monroe County has demonstrated only the first prong of this test—a mere intention—the court believes that the formation of the County's railroad authority supports a finding that the "preparedness" element has been satisfied as well. Further support for this conclusion can be found in the County's representation that the authority is prepared to issue bonds to finance a purchase of some of Conrail's property.

On the present limited state of the record, the court is convinced that Monroe County has shown that it comports with the requirements for standing in a Section 16 injunction action. *See Schoenkopf v. Brown & Williamson Tobacco Corp.*, 637 F.2d 205, 210-11 (3d Cir. 1980) (there is a "lower threshold" for standing in Section 16 actions than there is in treble damages actions). The County has satisfied the "primary concern" involved in resolving standing ques-

tions in Section 16 cases—it "adequately represents the interests of the 'victims' of the antitrust violation." *Id.*

In exercising its discretion to issue a temporary restraining order, a district court should consider whether (1) irreparable injury will result to the movant if the order is not granted; (2) the public interest will be furthered, or at least not damaged, by issuance of the order; (3) the threat of harm to the movant outweighs the harm to the opposing party; and (4) the movant has shown a likelihood of success on the merits. *E.g. United States v. Phillips*, 527 F. Supp. 1340, 1343 (D.D.C. 1981); *Crews v. Radio 1330, Inc.*, 435 F. Supp. 1002. No particular quantum of proof is required as to each of these factors. Rather, a balancing-type approach should be used. *See Louis v. Meissner*, 530 F. Supp. 924 (S.D.Fla. 1981); *cf. Delaware River Port Authority v. Transamerican Trail*, 501 F.2d 917, 923 (3d Cir. 1974).

Having reviewed the evidence presented and balancing the equities involved, I conclude a temporary restraining order should issue. If the order is not granted, plaintiffs would suffer immediate and irreparable injury in that the subject rail line's right of way is unique—once the tracks are removed, some easement rights may revert back to the original owners and cannot be replaced; removal of the spikes would necessitate realignment of the rails; if the rails were removed and plaintiffs ultimately prevail, the cost of relaying the rails would be prohibitive, estimated by Edson Tennyson as approximately $500,000 per mile, and plaintiffs would encounter immeasurable delay in entering the market while the rails were replaced. The

evidence adduced at the hearing clearly points to the furtherance of the public interest if the order is granted. Denial of the temporary restraining order would result in damage to the economic and social development of the regions adjacent to the subject rail lines. Moreover, no evidence of harm to Conrail should the order issue was presented. In view of the irreparable harm that would result to plaintiff, balancing the threat of harm to the movant as against the harm to the opposing party militates strongly in favor of a temporary restraining order. Finally, the court believes that a sufficient likelihood of success exists to sustain the issuance of a temporary restraining order inasmuch as consideration of the other factors so strongly favors the granting of said order. *See Delaware River Port Authority v. Transamerican Trail Transport, Inc.*, 501 F.2d 917, 923 (3d Cir. 1974).

The court has been informed that the parties have agreed on the appropriate amount of security in the event the restraining order is issued. Therefore, security shall be ordered to be posted by plaintiffs as has been agreed.

An appropriate order will issue.

(s) William J. Nealon
Chief Judge, Middle
District of Pennsylvania

Dated: March 2, 1983
12:55 PM, E.S.T.

TEMPORARY RESTRAINING ORDER

In accordance with the findings in the accompanying memorandum, it is ordered that:

(1) Consolidated Rail Corporation be and hereby is restrained from dismantling or removing the Lackawanna Main Line running between Hoboken, New Jersey, and Scranton, Pennsylvania;

(2) The plaintiffs shall post security in the amount as has been agreed to by the parties; and

(3) This order shall expire in ten (10) days.

(s) William J. Nealon
Chief Judge, Middle
District of Pennsylvania

Dated: March 2, 1983 at 12:55 P.M., EST

SPECIAL COURT
REGIONAL RAIL REORGANIZATION ACT OF 1973

CA 83-1

CONSOLIDATED RAIL CORPORATION,
Plaintiff,

v.

COUNTY OF MONROE, NANCY SHUKAITAS, Chairman, Monroe County Board of Commissioners, individually and in her official capacity; JESSE D. PIERSON, Member, Monroe County Board of Commissioners, individually and in his official capacity; and THOMAS R. JOYCE, Member, Monroe County Board of Commissioners, individually and in his official capacity,
Defendants.

OBJECTIONS OF COUNTY OF MONROE, NANCY SHUKAITIS, JESSE D. PIERSON AND THOMAS R. JOYCE

County of Monroe, Nancy Shukaitis, Jesse D. Pierson, and Thomas R. Joyce (collectively referred to as "Monroe County" or "respondents") through counsel

file its objections to the Complaint of Consolidated Rail Corporation ("Conrail") for injunctive, declaratory, and such other relief as may be appropriate and states as follows:

1. The Special Court lacks original and exclusive jurisdiction under §1152(a) of the Northeast Rail Service Act ("NERSA"), 45 U.S.C. §1105(a), to hear Conrail's action. Contrary to Conrail's allegations, the injunctive action filed by Monroe County, entitled *County of Monroe, et al. v. Consolidated Rail Corporation*, M.D. Pa., No. CV-83-0107, in no way involves or relates to the enforcement, operation, execution, or interpretation of any provision of or amendment made by this Chapter or administrative action taken thereunder to the extent such action is subject to judicial review. The sole basis for relief sought by Monroe County is under the federal antitrust laws, specifically §2 of the Sherman Anti Trust Act, 15 U.S.C. §2, which is not the "chapter" to which §1152 (a)(1) refers. Even assuming *arguendo* that the County's action could be said to involve an interpretation of action taken under §308 of the Regional Rail Reorganization ("3R") Act, 45 U.S.C. §748, the reference to "chapter" in §1152 (a)(1) is to chapter 20 of title 45. Section 308 is contained in Chapter 16 of that title. Accordingly, no jurisdiction in the Special Court can be found under §1152 (a)(1) as it relates to injunctive relief.

2. The Special Court also lacks original and exclusive jurisdiction under §1152 (a)(1) to hear Conrail's complaint because the action the County has taken in the District Court in no way involves any effort to

challenge, review or interpret administrative action subject to judicial review. Monroe County is not attempting to challenge or review the Interstate Commerce Commission's abandonment certificate served March 11, 1982, or July 7, 1982.

3. Furthermore, the Special Court's original and exclusive jurisdiction under §1152 (a) is not invoked because Monroe County has not attempted in the District Court to challenge the constitutionality of any provision or amendment made by this Chapter, to obtain, inspect, copy or review any documents discoverable in litigation, or to seek a judgment upon any claim against the United States founded upon the Constitution and resulting from the operation of any provision of an amendment made by this chapter.

4. The Special Court lacks original and exclusive jurisdiction to hear Conrail's claim because the actions taken by Monroe County which it seeks to enjoin do not fall within the ambit of §209 (e)(1) and (2) of the 3R Act. Monroe County has not attempted to seek relief against any actions taken by the U.S. Railway Association ("Association"), challenge any action by the Association, challenge the legality and constitutionality of any chapter or provision of the 3R Act, obtain, inspect, copy, or review any document in possession or control of the Association, to set aside or annul or seek reconveyance of rail properties previously conveyed under the Association's final system plan, or to take any action with respect to continuing reorganizations and supplemental transfers. Moreover, Monroe County has not sought in any manner or form to interpret, alter, amend, modify, or implement

orders of the Special Court to effect the purposes of this chapter or the goals of the final system plan.

5. The Special Court has no jurisdiction under §209 (g) of the 3R Act, 45 U.S.C. 719 (g) and §1152 (c) of NERSA, 45 U.S.C. §1105 (c), to entertain a request by Conrail seeking to stay or enjoin the District Court proceeding as contrary to or impairing the effective implementation of, or interfering with the execution of any order of the court pursuant to this chapter. The extraordinary provisions of §209 (g) only apply to Special Court proceedings brought under §209 (e)(1) or (2) and do not relate in any way to the §1152 remedies. Section 1152 contains no comparable provision and in no way amends §209 or incorporates the §209 (g) provisions.

6. The District Court's jurisdiction to entertain the antitrust claim asserted by Monroe County is in no way precluded by §601 (a)(1) or (2) of the 3R Act, 45 U.S.C. §791 (a)(1) and (2).

7. Even assuming that the Special Court should find that it has jurisdiction to entertain Conrail's complaint under §209 (e) and can enjoin the District Court proceedings under §209 (g), Monroe County asserts that it still has no jurisdiction to hear its antitrust claims. Its action to stop Conrail's practice of segmenting and abandoning rail lines to prevent potential competitiors from assembling them into a continuous railroad corridor is not a matter so central to the functions of the Special Court to warrant its jurisdiction.

WHEREFORE, the County of Monroe, Nancy Shukaitis, Jessie D. Pierson, and Thomas R. Joyce,

respectfully prays this Court to dismiss the complaint filed by Consolidated Rail Corporation for injunctive and declaratory relief for lack of jurisdiction.

Respectfully submitted,
COUNTY OF MONROE,
NANCY SHUKAITIS, JESSIE
D. PIERSON, and THOMAS
R. JOYCE.

(s) John D. Heffner
John D. Heffner
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March 4, 1983

Of Counsel:

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Order of Special Court, Mar. 4, 1983

SPECIAL COURT
REGIONAL RAIL REORGANIZATION ACT OF 1973

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§1152 Panel
C.A. No. 83-1

CONSOLIDATED RAIL CORPORATION,

Plaintiff,

v.

COUNTY OF MONROE; NANCY SHUKAITAS, Chairman, Monroe County Board of Commissioners, individually and in her official capacity; et al.

Defendants.

NOTICE OF HEARING

The Special Court will hear oral argument on Consolidated Rail Corporation's motion for a preliminary injunction and declaratory judgment on March 11, 1983, at 9:30 A.M. in Courtroom Number 21, United States Courthouse, Third & Constitution Avenue, N.W., Washington, D.C. Plaintiff and defendants shall limit their oral argument to 30 minutes each.

Order of Special Court, Mar. 4, 1983

(s) Richard E. Eriksen
Richard E. Eriksen
Executive Attorney

March 4, 1983

SPECIAL COURT
REGIONAL RAIL REORGANIZATION ACT OF 1973

SEC. 1152 PANEL
C.A. NO. 83-01

CONSOLIDATED RAIL CORPORATION,

Plaintiff,

v.

COUNTY OF MONROE; NANCY SHUKAITAS, Chairman, Monroe County Board of Commissioners, Individually and in her official capacity; JESSE D. PIERSON, Member, Monroe County Board of Commissioners, Individually and in his official capacity; and THOMAS R. JOYCE, Member, Monroe County Board of Commissioners, Individually and in his official capacity,

Defendants.

Courtroom No. 21
United States Court House
Third and Constitution Ave., N.W.
Washington, D. C. 20001
March 11, 1983

Argument Before Special Court

The above matter came before the Honorable Oliver Gasch, United States District Court Judge (Presiding), the Honorable William B. Bryant, United States District Court Judge, and the Honorable Charles R. Weiner, United States District Court Judge, for oral argument on plaintiff's motion for a preliminary injunction and declaratory judgment, at 9:30 A.M.

* * * *

[6] That didn't work out, the opportunity to buy it at 75 percent of the discount value.

JUDGE WEINER: I don't think they complain about it. I think they agree with everything that you say. And I think they also take the position that they made an offer, they withdrew that offer, and that they are now proceeding along a different line completely.

Suppose, for example, for the sake of this discussion—suppose they actually had an antitrust case. Where would they bring that, in your view?

MR. SHESTACK: Your Honor, it depends on what you are doing on an antitrust case. If they are trying to seek damages in an antitrust action, they can do that anywhere they want to bring that. But if what they are trying to do is enjoin the abandonment and liquidation of the line, they have to come here. And if you look at their prayer at the ultimate end of their complaint, their prayer says, "We want to enjoin the abandonment and liquidation of these three segments." And no other court can do that. And all we are asking this court is to enjoin Monroe County from trying to

enjoin the operation of that liquidation/abandonment plan.

That plan is nothing new. It was presented to Congress in a book that is this thick. There were 311 applications for abandonment that were filed under this plan. The whole purpose of NERSA in 1981, which enlarged the jurisdiction

* * * *

[20] What your appraisal of the merit is.

MR. HEFFNER: Your Honor, we have an opinion from Judge Nealon in which he had considered this question, and he found that, indeed, there was merit.

JUDGE GASCH: He was not dealing with the ultimate merits of your case, though. That is one of the things that we usually consider.

MR. HEFFNER: I would say that we would probably need an evidentiary hearing, which this is not.

JUDGE GASCH: What evidence would you contemplate adducing at that time?

MR. HEFFNER: Well, for example, there are many instances which we could cite to you where it has been alleged that Conrail's systematic segmenting abandonment process has precluded competition. For example, the Pittsburgh & Lake Erie Railroad, a railroad in the Pittsburgh part of Pennsylvania—

JUDGE WEINER: Counsel, how does somebody getting out of the business preclude you from going

ahead and doing what you are going to do? I can understand if somebody is in a market preventing you from marketing your product or trying to price you out of that market, or causing you not to be able to go in there, but this is a business that is getting out of the business. How are you precluded from going ahead and going your own way?

* * * *

[22] JUDGE WEINER: Can the community support a rail line?

MR. HEFFNER: In my opinion, Your Honor, the community can support a rail line, and, in fact, in an evidentiary hearing we would submit testimony about the need for both freight and passenger service over the line.

JUDGE WEINER: Then why didn't you enter into some kind of negotiations to try to buy this line when you had an opportunity to do so?

MR. HEFFNER: Your Honor, we have tried. The problem is that we can't—there would be no point in our buying a ten-mile piece without any traffic, and the reason is we would be buying a bike path or a nice hiking trail, and at a premium price. The county would have no use for buying something that has no on-line traffic where the intervening sections, which we would also like to buy, have that traffic.

What Conrail is doing is cream-skimming, putting it very bluntly. Conrail's intentions in this regard are well known. In the words of its chairman, who was interviewed by The Olean Times Herald, "We're not

interested in having another carrier in the New York market. This route permits through service from Scranton or beyond into the New York market." Monroe County, to answer your question, has tried to work with Conrail and preserve essential rail service. We initially wanted to preserve Conrail's service on the Old Lackawanna Main Line into New York City. We didn't care whether it was

* * * *

[39] impossible for a would-be railroad purchaser to buy the entire corridor and use it for anything remotely related to transportation, except hiking and biking. That really is the harm that we are alleging, and which we believe we have shown and which we would show in an evidentiary court hearing.

Thank you, Your Honors.

JUDGE GASCH: Thank you.

MR. SHESTACK: Your Honors, just a few points.

Mr. Heffner was not at the proceeding before Judge Nealon, and I would like to represent to the court that the hearing before Judge Nealon was limited to the matter of irreparable harm. It did not go into the merits of the case. The judge said he did not want to do that; if he thought that there was an immediate possibility of irreparable harm, he had the power to issue a temporary restraining order. And we don't question his power to issue a temporary restraining order. He made that clear in a footnote, and then he said the likelihood of success at one point was only because there was that demonstration of irreparable

harm. Conrail didn't even put on any witnesses, and there was nothing to do with the merits there.

Mr. Heffner has made a mistake, unfortunately, in reading the statute. He keeps saying that this Special Court shall have original and exclusive jurisdiction over any civil action for injunctive, declaratory or other relief. He keeps

* * * *

harm. Conrail didn't even put on any witnesses, and there was nothing to do with the merits there.

Mr. Heffner has made a mistake, unfortunately, in reading the statute. He keeps saying that this Special Court shall have original and exclusive jurisdiction over any civil action for injunctive, declaratory or other relief. He keeps

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UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 83-0167
(NEALON, C.J.)

COUNTY OF MONROE, *et al.*,

Plaintiffs,

v.

CONSOLIDATED RAIL CORPORATION,

Defendant.

ANSWER TO AMENDED COMPLAINT

Defendant, Consolidated Rail Corporation ("Conrail"), by its counsel, answers plaintiffs' complaint as follows:

FIRST DEFENSE

1. Defendant admits that plaintiffs have brought this action seeking the alleged relief, but denies that plaintiffs are entitled to obtain injunctive or any other relief.

2.-3. Admitted.

4. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 4.

5.-7. Admitted.

8. Defendant admits the allegations in the first sentence of paragraph 8, admits that defendant was created under and is subject to the statutory provisions cited in paragraph 8, and further states that the other allegations of paragraph 8 constitute conclusions of law to which no answer is required.

9. Defendant denies the allegations in paragraph 9 and further states that they constitute conclusions of law to which no answer is required.

10. Admitted.

11. Denied as stated. Defendant admits that on February 4, 1983 defendant agreed with plaintiffs that for a period of one week, until February 11, 1983, it would not remove rail from the line of railroad between Port Morris Junction, New Jersey, and the Pennsylvania State line. Defendant denies that it agreed that it would not remove rail spikes, and on the contrary avers that defendant and plaintiffs agreed that defendant would remove rail spikes but would not remove rails until February 11, 1983. Defendant further avers that on February 11, 1983, defendant agreed to forego the removal of rail from the line through February 22, 1983.

12. Admitted.

13. Admitted. Defendant further avers that on February 11, 1983 it agreed that its forebearance to remove rails would be extended to February 22, 1983.

14. The allegations of paragraph 14 constitute conclusions of law to which no answer is required.

15. The allegations of paragraph 15 constitute legal conclusions to which no answer is required.

16. Defendant admits that it intends to abandon the portions of its railroad referred to in paragraph 10 of the Amended Complaint, but defendant denies the other allegations of paragraph 16.

17.-20. Defendant denies the allegations contained in paragraphs 17 to 20. On the contrary, defendant avers that the net liquidation prices for the portions of the subject rail line have been set by the Interstate Commerce Commission according to law. Defendant also avers that the statutory periods for the different segments of the Lackawanna Main Line ran at different periods solely because plaintiffs made offers to purchase two but not all of the segments, causing differences in the periods during which the segments could be purchased. Further, defendant avers that the offers made by plaintiffs were at only a small fraction of the net liquidation value as determined by the ICC, and were accompanied by proposed terms and conditions that were found unacceptable by the Interstate Commerce Commission.

21. Defendant denies the allegations of paragraph 21, and on the contrary asserts that plaintiffs' offers to purchase were inadequate, subject to unreasonable terms and conditions, and not made in good faith.

22.-23. Defendant denies the allegations contained in paragraphs 22 and 23, and on the contrary

asserts that plaintiffs and others have had many opportunities to purchase parts of the said line in accordance with statutory procedures established by Congress.

24. Admitted.

25.-31. Defendant denies the allegations contained in Paragraphs 25 to 31.

SECOND DEFENSE

32. This Court lacks jurisdiction over the subject matter of any claim that may be stated in the Amended Complaint.

THIRD DEFENSE

33. Plaintiffs lack standing, capacity or authority in this Court to assert the cause of action set forth in the Amended Complaint.

FOURTH DEFENSE

34. Plaintiffs' Amended Complaint fails to state a claim or cause of action upon which relief may be granted.

FIFTH DEFENSE

35. None of the acts charged in the Amended Complaint constitutes a violation of Section 2 of the Sherman Act or of any other provision of the antitrust laws of the United States.

SIXTH DEFENSE

36. Any claim that defendant has violated Section 2 of the Sherman Act or any other part of the an-

titrust laws of the United States is barred by the doctrine of implied immunity.

SEVENTH DEFENSE

37. Defendant avers that plaintiffs are estopped from claiming defendant has denied plaintiffs and other interested persons the opportunity to purchase all or part of the Lackawanna Main Line, because plaintiffs and others had notice of the proposed abandonments of the said line, made offers to acquire portions of the said line, and had full opportunity to acquire the said portions at prices established by the Interstate Commerce Commission pursuant to law.

EIGHTH DEFENSE

38. Defendant avers that plaintiffs are barred by the doctrines of laches and collateral estoppel from claiming defendant has denied plaintiffs the opportunity to purchase parts of the Lackawanna Main Line, because plaintiffs participated in the statutory process established by Congress to determine the net liquidation value for and made offers to purchase parts of the said Line, and then withdrew their offers, refusing to purchase at the prices and terms established by the Interstate Commerce Commission.

NINTH DEFENSE

39. Defendant avers that plaintiffs' claim that defendant has violated the antitrust laws of the United States is barred by the *Noerr-Pennington* Doctrine, in that defendant's actions were lawful and proper efforts by defendant to induce governmental action to approve abandonments of rail lines pursuant to the ad-

ministrative process established by Congress for that purpose.

TENTH DEFENSE

40. Defendant avers that plaintiffs' Amended Complaint is barred by the principle expressed in 28 U.S.C. § 1927, in that the Amended Complaint asserts a frivolous and sham cause of action under the guise of an antitrust claim, and constitutes an unreasonable and vexatious extension and multiplication of proceedings designed to thwart and frustrate defendant's lawful abandonment of certain rail lines pursuant to law.

WHEREFORE, defendant, Consolidated Rail Corporation, demands judgment in its favor and prays that the Court dismiss the Amended Complaint and grant to defendant the costs of this action and reasonable attorneys' fees, together with such other and further relief as may be just and proper.

(s) Jerome J. Shestack
Jerome J. Shestack
Robert L. Kendall, Jr.
Attorneys for Defendant
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Of Counsel.

SPECIAL COURT
REGIONAL RAIL REORGANIZATION ACT OF 1973

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§ 1152 Panel
C.A. No. 83-1

CONSOLIDATED RAIL CORPORATION,

Plaintiff,

v.

COUNTY OF MONROE; NANCY SHUKAITAS, Chairman, Monroe County Board of Commissioners, individually and in her official capacity; et al.,

Defendants.

Before GASCH, Presiding Judge, and BRYANT and WEINER, Judges.

BRYANT, Judge:

Plaintiff in this action seeks a declaratory judgment and preliminary and permanent injunctive relief. Specifically, Consolidated Rail Corporation (Conrail) requests an order declaring that the Special Court has original and exclusive jurisdiction over the claim for relief asserted in this action and enjoining defendants, County of Monroe and its Board of Commissioners

(County) from taking any further action in pursuit of injunctive relief in a suit filed by them in the Middle District of Pennsylvania entitled *County of Monroe, et al. v. Consolidated Rail Corporation*, CV. No. 83-0167. Defendants have filed a motion to dismiss the complaint for lack of subject matter jurisdiction. We grant plaintiff's request for declaratory judgment and injunctive relief. The defendants' motion to dismiss is denied.

This action arises out of defendants' efforts to prevent Conrail from implementing a plan to dismantle segments of its tracks on the Scranton Line, between Scranton, Pennsylvania and Port Morris, New Jersey, in accordance with the abandonment procedures specified in section 308 of the Regional Rail Reorganization Act of 1973 (3 R Act) as added by § 1156 of the Northeast Rail Service Act of 1981 (NRSA), 45 U.S.C. § 748 (Subtitle E of Title XI of the Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35).[1] This legislation establishes an abandonment

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[1] Section 308(e):

LIQUIDATION.—(1) If any application for abandonment is granted under subsection (b) of this section, the Commission shall, as soon as practicable, appraise the net liquidation value of the line to be abandoned, and shall publish notice of such appraisal in the Federal Register.

(2) Appraisals made under paragraph (1) shall not be appealable.

(3)(A) If, within 120 days after the date on which an appraisal is published in the Federal Register under paragraph (1), the Corporation receives a bona fide offer for the sale, for 75 percent of the amount at which the liquidation value of such line was appraised by the Commis-

procedure that deviates significantly from the traditional abandonment provisions of 49 U.S.C. § 10901 *et seq*. Under § 308, Conrail is not required to submit an abandonment application to public protest, investigation or review under a public convenience and necessity test. Congress intended that the abbreviated abandonment procedure added to the 3 R Act by NRSA would permit Conrail to expeditiously dispose of obsolete or unprofitable lines in favor of service on the railroad lines with the best opportunity for growth and profitability. This would facilitate the sale of Conrail lines to the private sector and local governments. 127 Cong. Rec. H5956 (1981) (Explanatory Statement of House and Senate Conferees on Omnibus Reconciliation Act of 1981). The overriding intent of

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sion, of the line to be abandoned, the Corporation shall sell such line and the Commission shall, unless the parties otherwise agree, establish an equitable division for joint rates for through routes over such lines.

(B) If the Corporation receives no bona fide offer under subparagraph (A), within such 120-day period, the Corporation may abandon or dispose of the line as it chooses, except that the Corporation may not dismantle bridges, or other structures (not including rail, signals, and other rail facilities) for 120 days thereafter. The Secretary may require that bridges or other structures (not including rail, signals, and other rail facilities), not be dismantled for an additional 8 months if he assumes all liability of any sort related to such property.

(4) If the purchaser under paragraph (3)(A) of this subsection of any line of the Corporation abandons such line within five years after such purchase, the proceeds of any track liquidations shall be paid into the general fund of the Treasury of the United States.

Congress was to provide an unobstructed opportunity for Conrail to become a solvent operation and to return it to the private sector.[2]

After the enactment of NRSA, pursuant to § 308 of the 3 R Act, Conrail began abandonment procedures on many of its rail lines.[3] Conrail alleges that it filed three applications with the Interstate Commerce Commission (ICC) for approval of the abandonment of the three contested segments of the Scranton Line: Port Morris Junction to State Line, New Jersey; State Line to Slateford, Pennsylvania; and Analomink to Mt. Pocono, Pennsylvania. The statute provides that after Conrail files an application to abandon, parties interested in continuing rail service on those lines have 90 days to submit an "offer of financial assistance" to subsidize or purchase the lines and assure continued operation. Section 308(d), 45 U.S.C. § 748(d). Conrail maintains that no offer of financial assistance was submitted for the New Jersey segment. The County submitted offers for the two Pennsylvania segments at issue in this lawsuit, however, Conrail alleges the County withdrew the offers with the intent to pursue acquisition under the discount provisions of NRSA. Section 308(e)(3), 45 U.S.C. § 748(e)(3).[4]

The ICC approved abandonment of the two Pennsylvania segments of the Scranton Line on July 7, 1982, and thereafter appraised the net liquidation

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[2] *See* § 1133 of NRSA, 45 U.S.C. § 1102.
[3] Conrail Complaint ¶ 11.
[4] Conrail Complaint ¶ 18.

values of the lines, and published those appraisals in the Federal Register.[5] Conrail received no offers to purchase the lines at 75% of net liquidation value, as provided for by § 308(e)(3)(A), 45 U.S.C. § 748(e)(3)(A).[6]

Prior to expiration of the 120-day period available for making offers at 75% of net liquidation value, the County filed an action on February 8, 1983 in the United States District Court for the Middle District of Pennsylvania seeking injunctive relief to prevent Conrail from dismantling any segment of track on the Scranton Line, running between Scranton, Pa. and Port Morris, N.J. The County originally alleged that Conrail had violated § 304(b) of the 3 R Act, 45 U.S.C. § 744(b) by failing to provide the County with sufficient notice before proceeding with abandonment of the line. The County also alleged violations of the Sherman Act, claiming that the abandonment and liquidation of the Scranton Line was undertaken in a manner which precluded other entities from operating a railroad in competition with Conrail's Lehigh Valley Line, placing Conrail in a monopoly position in Western Pennsylvania.

On February 10, 1983, the County amended its complaint to drop the challenge to Conrail's abandonment under the 3 R Act and NRSA. The County has, since February 10, only pursued the antitrust cause of action.

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[5] 47 Fed. Reg. 47479, 49095.

[6] Conrail Complaint ¶ 19.

The County applied for a temporary restraining order (TRO), seeking to enjoin Conrail from physically dismantling the railroad track on the Scranton Line. The District Court for the Middle District of Pennsylvania found that the County would suffer irreparable harm if the injunction did not issue, and restrained Conrail from disassembling the portions of the Scranton Line that it had scheduled for removal. (Slip opinion, March 2, 1983, M.D. Pa., CV. No. 83-0167). The TRO expired on March 12, 1983. Conrail has not attempted to remove any additional trackage.

After issuance of the TRO, and before any action was taken on the merits of the County's claim in the Pennsylvania court, Conrail filed this action in the Special Court. Conrail maintains that the defendants are precluded from seeking an injunctive order concerning its abandonment plan in any tribunal other than the Special Court. Conrail contends that the removal of the track on the Scranton Line is provided for by statute under § 308 of the 3 R Act as added by §1156 to NRSA, 45 U.S.C. §748 and as a provision of NRSA, this court must exercise original and exclusive jurisdiction over all aspects of the abandonment procedures.

In opposing Conrail's motion for declaratory and injunctive relief, the County filed a motion to dismiss. In its motion, the County maintains that this court lacks jurisdiction to enjoin it from pursuing its action in the Pennsylvania court, asserting that in effect this would amount to staying the proceedings in that court. Additionally, the County claims that its antitrust claim in the District Court in Pennsylvania is

unrelated to NRSA, thus depriving the Special Court of jurisdiction over the matter. In the alternative, the County urges that, assuming that we find original and exclusive jurisdiction, we should abstain from exercising it in this case.

The jurisdiction of this court is encompassed in § 1152 of NRSA as follows:

> (a) Notwithstanding any other provision of law, the special court shall have original and exclusive jurisdiction over any civil action—
>
> (1) for injunctive, declaratory or other relief relating to the enforcement, operation, execution, or interpretation of any provision of or amendment made by this subtitle, or administrative action taken thereunder to the extent such action is subject to judicial review.

It would appear that, on its face, NRSA does not confine this court to a limited range of issues, as is the case under the 3 R Act.[7] However, we believe that implicit in the grant of original and exclusive jurisdiction to the Special Court under NRSA is the intention that it will not consider every issue which might tangentially touch the provisions of NRSA. Our jurisdiction is limited to litigation which has the potential for significantly affecting implementation of the Act.[8]

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[7] *See* § 209(e) of that Act, 45 U.S.C. § 719(e).

[8] By way of illustration, if some adjacent landowner to a railroad right of way brought a complaint for trespass arising out of Conrail's dismantling process, that lawsuit would not fall within the jurisdiction of the Special Court because the matter complained of would involve the provisions of NRSA only tangentially.

In light of this approach, the defendants' contention that their lawsuit is strictly an antitrust action which in no way directly concerns any aspect of NRSA falls of its own weight. Our jurisdiction is not triggered by the label of a civil action, but by the type of relief sought. As we have indicated, the County seeks to prevent Conrail from dismantling its rail line. This obviously relates to "the operation" of the abandonment provisions of NRSA, and given the importance of these provisions to the overall legislative purpose, it in no way can be characterized as peripheral to the implementation of the statute. Thus we have no doubt that the action presently before us falls squarely within our jurisdiction.

The County, in its motion to dismiss, asserts that this court has no jurisdiction over this action because NRSA does not contain a provision analogous to §209(g) of the 3 R Act, authorizing the Special Court to stay an action in another court. We need not reach this issue, since we are enjoining defendants from pursuing injunctive relief. We are not attempting to stay the district court in the proper exercise of its jurisdiction.

It is therefore ORDERED that the County of Monroe and its Board of Supervisors are hereby enjoined from pursuing further injunctive relief in *County of Monroe v. Conrail*, CV. No. 83-0167 (M.D. Pa.).

(s) Oliver Gasch
Oliver Gasch
Presiding Judge

(s) William B. Bryant
William B. Bryant
Judge

(s) Charles R. Weiner
Charles R. Weiner
Judge

Order of Special Court, April 8, 1983

SPECIAL COURT
REGIONAL RAIL REORGANIZATION ACT OF 1973

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§1152 Panel
C.A. No. 83-1

CONSOLIDATED RAIL CORPORATION,
Plaintiff,

v.

COUNTY OF MONROE; NANCY SHUKAITAS, Chairman, Monroe County Board of Commissioners, individually and in her official capacity; et al.
Defendants.

ORDER DENYING DEFENDANTS' MOTION FOR STAY PENDING FILING OF PETITION FOR WRIT OF CERTIORARI

Upon consideration that on April 5, 1983, defendants in the above captioned matter filed a motion for a stay pending the filing of a petition for writ of certiorari along with a memorandum in support thereof.

IT IS ORDERED that defendants' motion for a stay be, and the same hereby is, denied.

(s) Oliver Gasch
Oliver Gasch
Presiding Judge
(s) William B. Bryant
William B. Bryant
Judge
(s) Charles R. Weiner
Charles R. Weiner
Judge

Dated: April 8, 1983

Affidavit of P. A. Lieberman

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action
No. 83-0167

COUNTY OF MONROE, in its own right and on behalf of the Monroe County Railroad Authority; NANCY SHUKAITAS, Chairman, Monroe County Board of Commissioners, individually and in her official capacity; JESSE D. PIERSON, Member, Monroe County Board of Commissioners, individually and in his official capacity; and THOMAS R. JOYCE, Member, Monroe County Board of Commissioners, individually and in his official capacity,

Plaintiffs

v.

CONSOLIDATED RAIL CORPORATION,

Defendant

Commonwealth of Pennsylvania:
: ss.
County of Lackawanna :

AFFIDAVIT

I, Philip A. Lieberman, being duly sworn according to law, depose and say:

I am the Regional Planner for the Economic Development Council of Northeastern Pennsylvania

with responsibility for all matters concerning surface transportation activity. I have been employed by the Economic Development Council for ten years. I have worked in the area of transportation for over ten years and have followed both the situation involved in the action filed by the Monroe County Commissioners and railroad matters generally since before Conrail was created. I am thoroughly familiar with nearly every aspect of railroad transportation in Northeastern Pennsylvania.

Historically, it has been the purpose of railroad legislation to promote and foster competition between providers of rail transportation. Contrary to this goal, Conrail has, since its inception, divided into segments rail lines not used by it in a deliberate effort to eliminate the possibility of competition from any other railroad in a given area. This result is effected when a railroad line is broken down piecemeal because no real, viable offers can be tendered when only a part of the line is available at any one time. No real opportunity is presented to a potential purchaser to whom a complete line is not available. In my opinion, Conrail's approach in Northeastern Pennsylvania and specifically with reference to the Lackawanna Main Line and the 27.5 miles of track which is the subject of the temporary restraining order being requested, is a deliberate attempt to prevent competition on that line by another company.

I am attaching to this affidavit a map on which the Lackawanna Main Line is shown in blue and the Lehigh Valley Line is shown in red. These two lines

are obviously in direct competition with one another in terms of the markets and regions they serve.

If the 27.5 miles of track on the Lackawanna Main Line is removed, there will be no potential for competition in an east-west route with the Lehigh Valley Line, the line Conrail now owns and operates to service this (the Northeastern Pennsylvania) geographic area. So long as the Lackawanna Main Line is not segmented by Conrail, the Line is a viable means of providing rail transportation to Northeastern Pennsylvania. The Delaware and Hudson Railway Company has expressed interest in buying the Lackawanna Main Line but has not been in a position to make an immediate offer pending its reorganization by prospective purchaser Guilford Industries, Inc. (Guilford awaits the approval of creditors of the Boston and Maine Railroad before it can assemble the system including D&H). D&H and others will have no interest in owning only disconnected pieces of the Lackawanna Main Line.

Furthermore, there is no other reason for Conrail's decision to eliminate the 27.5 miles of track. Conrail has presently a surplus of materials available to it for use in any other location where such materials may be needed.

It was not until November of 1981 that Conrail acknowledged that it intended to abandon the line. Until that time, Conrail had been manipulating its operating procedures and had declared that it was amenable to continuing service on the line. However, to accomplish its manipulation pending abandonment of the Lackawanna Main Line (while denying the in-

tent to do so) in 1978, Conrail spent $7,000,000 to improve the capacity of the Bangor and Portland branch connecting to the Lehigh Valley Line in order to provide service to the Metropolitan Edison plant at Portland. Previous to the improvements to the Bangor and Portland branch by Conrail, the Met-Ed plant had received 183 trains per year, each consisting of approximately 100 cars each carrying 100 tons of bituminous coal, via the Lackawanna Main Line.

It is extremely significant to note that no buyer for the Lackawanna Main Line has been found to date in large part because of the net liquidation value of the portions of the Lackawanna Main Line which have been set by Conrail and adjusted by the Interstate Commerce Commission (ICC). The value set by Conrail, as adjusted by the ICC, for the 27.5 miles in question is $2,310,601. To my knowledge, the ICC's adjustment was not based upon a field appraisal by the ICC but was purely an administrative adjustment. This figure is a gross overstatement of the net liquidation value of the property. Attached to this affidavit is a report submitted by me to the ICC in which the net liquidation value for the 27.5 miles of track is estimated to be less than zero. The property has little or no value and the cost to remove this line would far exceed the salvage value of the materials removed. By regulation, Conrail is required only to accept an offer of 75% of the net liquidation value set by the ICC and since the net liquidation value is grossly exaggerated, 75% of the figure still fails to present an accurate and fair value for the property such that prospective buyers might have consummated negotiations

for the purchase of the track. And, once the track is segmented, there will be no buyer interest in the remaining portions of the line.

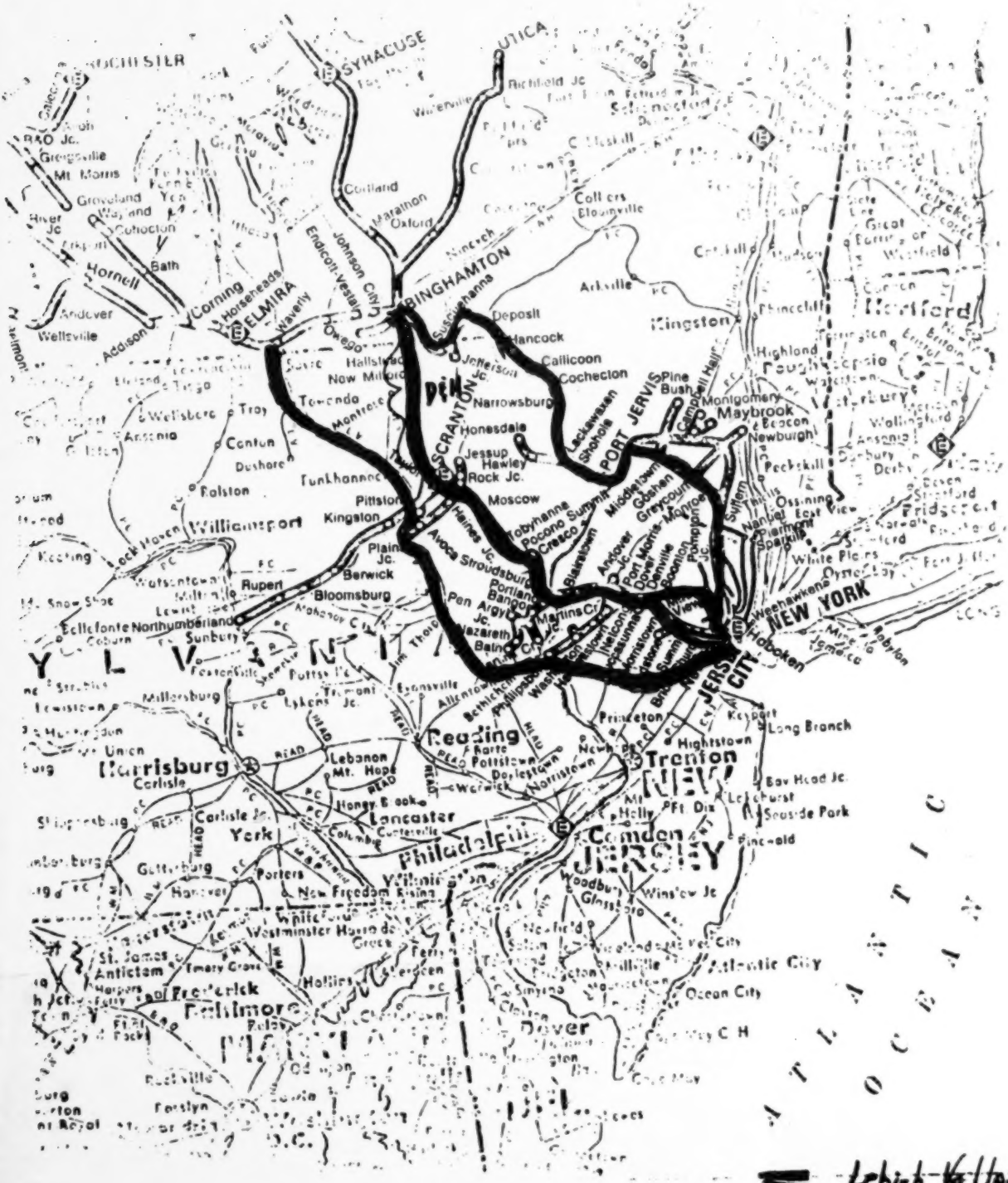
It is also my opinion and belief that Conrail has actively discouraged industrial development in Northeastern Pennsylvania, first by holding in abeyance any decision concerning the Lackawanna Main Line and then by segmenting the line. Significant industry will not locate in an area in which rail service is uncertain. In this regard, the Pocono Mountain Industrial Park will be severely hampered in attracting industrial tenants. Tourism in the Poconos is also being hurt by the lack of rail transportation and other attractions in the Poconos will be undermined by the lack of rail transportation. It is also my belief that Conrail played an active role in persuading Chrysler Corporation to leave the area by making better rates available to it for service into and out of Port Newark. Similarly, I believe that Conrail, by throwing up all possible hurdles such as disputing the capital improvements to be made to bring the line up to Federal Railroad Administration safety standards, prevented the resumption of passenger service to Scranton by Amtrak on the Lackawanna Main Line because it feared competition and feared that the presence of passenger traffic would disrupt its plans for liquidation of the Line. Attached to this affidavit is a chart prepared by me which reflects how much business could be generated for the Lackawanna Main Line on an annual basis if the line was reopened.

The only detriments to Conrail from leaving the 27.5 miles of track in question in place is the prospect

of competition. Absolutely no other detriment will result to Conrail if a temporary restraining order is entered.

(s) Philip A. Lieberman
Philip A. Lieberman

Sworn to and Subscribed
before me this 9th day
of February, 1983
(s) Margaret Decker
Notary Public
Scranton, Lackawanna Co., PA.
My commission Expires March 19, 1983


SYRACUSE
UTICA
BINGHAMTON
ELMIRA
SCRANTON
PORT JERVIS
Williamsport
Harrisburg
Reading
Trenton
Philadelphia
Camden
NEW YORK
Lehigh-Valley
(Contract)
DL&W (Lackawanna)

Affidavit of P. A. Lieberman

RAILROAD TASK FORCE FOR NORTHEAST REGION

Avoca, Pa. 18641

May 21, 1982

Atty. Wayne Michel
Office of Proceedings
Interstate Commerce Commission
Washington, D.C. 20423

RE: AB 167 (Sub No. 280 and 287)

Dear Sir:

In setting the net liquidation value for the captioned line, please consider carefully the attached appraisal report prepared for us by Mr. L. T. Joyce. Mr. Joyce's extensive research of the area probably exceeds any single document available to you at present.

Please feel free to contact me or Mr. Joyce for any further information concerning the "New Jersey Cut-Off."

Respectfully,

(s) Philip A. Lieberman
Secretary

PAL/emk

cc: Bureau of Finance

Enclosures

Affidavit of P. A. Lieberman

ESTIMATES OF NET LIQUIDATION VALUE

ICC AB 167 (Sub No. 280)

PORT MORRIS JUNCTION M.P. 45.7 - STATE LINE M.P. 73.2

ICC AB 167 (Sub No. 287)

STATE LINE M.P. 73.2 - WEST SLATEFORD JUNCTION 75.1

BY

KEYSTONE ASSOCIATION OF RAILROAD PASSENGERS

FOR

RAILROAD TASK FORCE FOR NORTHEAST REGION, INC.

Prepared by
L. T. Joyce
Public Utility Engineer
(717) 787-2325

May 11, 1982

The proposed abandonment at ICC AB 167 (Sub No. 280) Port Morris Junction M.P. 45.7 to State Line M.P. 73.2 and at ICC AB 167 (Sub No. 287) State Line M.P. 73.2 to West Slateford Junction M.P. 75.1 is a segment of rail line constructed by the former Delaware Lackawanna and Western Railroad Company between 1908 and 1911 and is known as the Lackawanna Cutoff. It was built to reduce the circuit and grades of the existing main line between Port Morris and West Slateford, PA. Grades were limited

to 0.6% and curvatures to 2° and the route was shortened by 11.1 miles.

To improve the gradient and shorten the route, the DL&W elected to cut across the hills and valleys rather than following the stream beds, a decision which would greatly improve the operating characteristics of the railroad. However, this improvement to the railroad, including the great bridges and vast cuts and fills, would lessen the value of the route "for other than rail use," for bridges and culverts must be removed on the eventual abandonment of rail line. If left in place they must be maintained, for culverts and bridges become safety hazards because they may impede the free flow of streams causing flooding; or people may fall from them.

If the structures are to remain, the cost of maintenance of the structures will continue for the responsible party for many years into the future, a cost which Conrail will not want to assume. A better solution would be to remove the structures, eliminate the fills and cuts, plug the tunnel and restore the right-of-way to the original contour of the land. In fact, the Commonwealth of Pennsylvania has informed both Conrail and the Interstate Commerce Commission that both highway and stream bridges and culverts will be removed on abandonment of the rail lines. (Attachment A.)

The demolition and removal of the concrete arch bridges will be very expensive, a cost that will be required of either Conrail or the taxpayer. (The cost of removal should not be borne by the taxpayer for it was the taxpayer who originally provided Conrail with

all the property it now owns and even provided for its rehabilitation, including this property it now wants to abandon. It would appear to be grossly unfair to now require the taxpayer to bear the cost of removing these structures.)

Moreover, the net liquidation value of these line segments eventually established by the ICC should include negative adjustment to reflect the cost of removing these structures. Apparently, Conrail agrees, for in AB 167 Sub-No. 168: Highland M P. 27.4 to Poughkeepsie M.P. 29.5, a 2.5 mile segment which includes the Poughkeepsie Bridge across the Hudson River, Conrail, in "Exhibit I" of its application, included a negative amount of ($5,000,000) for "Net Bridge and Building Salvage," evidently for the costs of removing this bridge. (Attachment B.) The inclusion of this amount reduced the item "Total Net Salvage" to zero.

Conrail did include $35,000 as the "Value of Real Estate," an item which Conrail carries through to "Net Liquidation Value" of the abandonment. We are of the opinion that the item "Value of Real Estate" should have been summed along with the other positive and negative numbers in Exhibit I of the application and that the "Net Liquidation Value" should have been zero and not $35,000. It is simply a matter of algebraic addition, i.e. when a number having a negative value which exceeds the value of all the other numbers, the sum of these items is negative.

TABLE ONE
LACKAWANNA CUT-OFF

Structures: Bridges—Major

Delaware River Viaduct M.P. 72.9-73.5
Length 1450 Ft.; Height 65'
Double Track; 9 Arches
? Yds.^{3} of Concrete; ? Tons Steel

Pauline Hill Viaduct M.P. 70.5
Length 1100 Ft; Height 110'
Double Track; 7 Arches
43.212 Yds.^{3} Concrete; 735 Tons Steel

There are 66 additional concrete arch or concrete slab crossings over streams and highways ranging from 75' to 6' in length.

Amount of concrete for all construction is 266,885 Yds.^{3}

Structures: Tunnels

Roseville M.P. 51.36-51.75
Length 1010 ft.

Structures: Fills

	Capacity	*Length*	*Max. Height*	*Average Height*
Vail	293,500 Yds.^{3}	1700'	102'	39'
Ramsey	805,431 Yds.^{3}	2800'	80'	21'
Pequest	6,625,648 Yds.^{3}	16500'	110'	75'
Lubben Run	720,000 Yds.^{3}	2100'	98'	64'
Bradbury	475,000 Yds.^{3}	4000'	78'	24'

There are 13 major fills en route averaging from 21' to 75' above surrounding terrain containing

8,901,629 Yds.^{3} Total volume of all fills is 15,000,000 Yds.^{3}

Structures: Cuts

	Material Removed	*Length*	*Max. Depth*	*Average Depth*
Armstrong	852,000 Yds.^{3}	4700′	104′	52′
Jones	578,000 Yds.^{3}	na	na	na
Colby	662,342 Yds.^{3}	2800′	110′	45′
Waltz-Rose	822,400 Yds.^{3}	5500′	54′	29′

There are 15 major cuts, average depth of each ranging from 29′ to 52′. Maximum depth is 114′. Total length of these major cuts is 19,600′. Total volume of material removed from these 15 major cuts is 3,514,742 Yds.^{3} Total volume of material removed from all cuts on route is 14,000,000 Yds.^{3}

Sources for Table One

Stocks, J. W. "Constructing the Lackawanna Cutoff." *National Railway Bulletin*, XLII (No. 5), 1977. pp. 33-41.

Foster, Charles D., ed. "Lackawanna Railroad." *National Railway Bulletin*, XXXV (No. 6), 1970.

King, Sheldon S. *The Route of Phoebe Snow*. Elmira Heights, N.Y.: by the author, 1974.

Taber, Thomas T. *The Delaware, Lackawanna, and Western Railroad in the Twentieth Century*. Vol. 1. Muncy, Pennsylvania: by the author, 1980.

Gross Track Salvage

Rail. Conrail's Track Charts, Lehigh Division, for 1980 give a physical description of the rail line. (Attachment C.)

Affidavit of P. A. Lieberman

Between Port Morris Junction and West Slateford Junction, most of the rail, 6248 tons, was installed between 1939 and 1942. The remainder was installed in 1953, 1959 and 1974. New Jersey Department of Transportation, Bureau of Rail Safety, made a survey of the rail line between M.P. 48.5 and M.P. 74.3 and found the rail to be acceptable for FRA Class III Standards. It was their opinion that most of the rail would be acceptable as relay rail.

Conrail calculates the price of relay rail at 60% of the cost of new rail. (See "Budget Estimating Guide" i.e. "Fit Value—60% of New" Attachment D.)

The price of new rail per ton was established on the basis of the successful bid by Firth Limited (sales arm of British Iron and Steel) of 1000 tons of 115# rail for Southeastern Transportation Authority rail renewal program. The average price per ton on the basis of this sale was $467.

Most relay rail is now welded in quarter mile lengths; therefore, there is no need for splice bars. In addition, most relay rail is "cropped," 18" from each end before welding. The gross tonnage for rail will be adjusted downward by 20% to reflect this loss and also to reflect the general loss of weight from wear and the action of the elements that occurred over the 40 year life of the rail.

Other Track Material

Splice bars, tie plates, spikes and track bolts are classified as other track material. Now that most rail is welded before relaying, the need for splice bars and track bolts has reduced the demand for this material.

Tie plates were installed as part of the rail renewal program of 1939-1942, and are now deteriorated to the point where they would not be used for relay.

There are 93 tons of "Other Track Material" per mile of track. This material will be valued at $94.00 per ton (RR Specialities) FOB Philadelphia, as quoted in *Iron Age*, effective February 16, 1982 (Attachment E).

Ties

On the basis of 20 ties per rail length, there would be 2708 ties per mile or 85,171 ties in the 29.4 rail segment between M.P. 45.7 and M.P. 73.2. It is estimated that one-third of this amount or 28,434 are acceptable as relay ties, another third or 28,434 are only usable for landscaping and the remainder have so badly deteriorated that they have no value (W.P. No. 2). "Building Construction Costs" published by Robert Means (1982) (p.65) (Attachment F) price of treated timber ties at $16 each. Since this rail segment was last retied in 1974, a relay price of 50% of the price of new material, or $8.00 per relay tie would be correct. The remaining third should be priced at $1.00 each for sale to landscapers.

Ballast

The cost for the recovery of ballast and stockpiling it for future use would exceed the cost of new ballast. Therefore, railroads do not attempt to salvage ballast for reuse. In addition, the area where the rail is located is so isolated, that outside vendors would not pay the railroad for the right of salvage to the ballast. The value of ballast to the railroad is zero.

Gross Track Salvage

Gross track salvage for that segment of the rail line proposed for abandonment at ICC AB 167 (Sub No. 280) between M.P. 45.7 and M.P. 73.2 is $2,153,-194.

Communications and Signals Gross Salvage

Conrail did not show any salvage for communication or signals in the line segment between Port Morris Junction M.P. 45.7 and State Line M.P. 73.2, which was rightfully so, since most of the signal and communications system along this segment of the rail line has been extensively vandalized. In addition, it would appear that little or no maintenance has been performed since long before the rail segment was removed from active service. Lastly, there is little market for this type of equipment.

We agree with Conrail that signal and communication systems' little or no salvage for cost removal would exceed the sale value.

Cost of Demolition of Bridges and Culverts

The rail segment of the former DL&W between Port Morris Junction and West Slateford Junction contains 73 bridges and culverts including the two major bridges, the Delaware River Viaduct and Paulins Kill Viaduct. Most are of reinforced concrete arch construction. Besides the two major viaducts, there are additional structures spanning highways and smaller streams that for reasons of safety should be removed.

To determine the cost of removal of these structures, an attempt was made to find the cost of remov-

ing similar structures. A 1365' concrete arch highway bridge across the West Branch of the Susquehanna River at Northumberland, PA was removed and replaced with a steel girder bridge in 1976. Although the height of this bridge is 18' as opposed to a height of 65' of the Delaware Viaduct and 110' of the Paulins Kill Viaduct, the successful bid for the cost of removing this much smaller bridge was $805,000. We can safely assume then that the cost of removing the much larger railroad bridges would greatly exceed the cost of removing the highway bridge. Even if cost of removal for the railroad bridges were the same as the cost of removing the highway bridge, the cost of removing just these two bridges of the 73 along the rail segment (Attachment G) would exceed $1,600,000. If this amount were plugged into Conrail Exhibit D "Net Bridge and Building Salvage," the cost of removal would exceed "Total Net Salvage Value" by $113,625. Another method of computing the cost of removal of these bridges is to assign cost per cubic yard to the number of cubic yards in the structure. Unfortunately, none of the publication which provided unit costs for estimating costs of construction, provided unit costs for the demolition of bridges. Building Construction Cost Data-1982, Robert Means P. 2 "Site Removal" (Attachment F.), provides unit costs for demolition of "reinforced concrete foundation" at a cost of $85.00/cubic yard and "elevated slabs" at a cost of $82.00/cubic yard. Based on these estimates, the 43,212 yd^3 Paulins Kill Viaduct would cost $3,456,960 for removal at $80.00/cubic yard. An additional $6.90 per cubic yard is the estimate for the cost of disposal. Since these estimated unit costs are for reinforced concrete foun-

dations and elevated slabs, applying these unit costs to the cubic yard volume of the bridge will understate the estimated cost of demolition of the bridge because of its great height and because the bridge passes over a public highway. Although it is difficult to develop a precise estimate of the cost of removal of the Delaware River Viaduct and Paulins Kill Viaduct, we believe sufficient evidence has been presented to show, as in the case of Conrail's estimating the $5,000,000 net cost for removing the Poughkeepsie Bridge, (AB 167 (Sub No. 168)) (Attachment B) that cost of removing these two great bridges and 71 other bridges and culverts will greatly exceed the proceeds from the sale of salvage or real estate.

Removal of Fills and Contouring of Cuts

"Building Construction Cost Data" by Robert Means, (Attachment F) provides estimates for grading at the lowest cost available for grading, $1.02 per cubic yard, the cost of removing and contouring Pequest Valley fill, which contains 6,625,648 cubic yards of material would be $6,758,000. There are 8,901,629 cubic yards of material in all the fills along this rail line.

There are 15 major cuts on the rail where 3,514,742 cubic yards of material was removed. The total volume of all cuts on the line is 14,000,000 cubic yards. Again, if only the major cuts are graded to the contour of the surrounding land, the cost would again exceed any estimate of the net salvage value.

Roseville Tunnel

We estimate that the cost to adequately plug the Roseville Tunnel to ban unauthorized persons from entering the bore would be $200,000.

Real Estate

United States Railway Association provided information showing that in the rail segment between M.P. 45.4 and M.P. 74.5, there were 861.2 acres of real estate conveyed to Conrail. USRA found that 387.4 acres of this amount would have zero value because the cost of "curing" the acreage to make it acceptable to sale for non-rail purposes would have exceeded the value of the real estate. This is understandable since 48,985 feet of the right-of-way (9.29 miles) or more than one-third of the total length of the rail segment is either bridged, tunneled, buried under fill or located in deep cuts.

USRA estimated that base value of the 861 acres of real estate for this segment of the rail line to be $240,480. (Note: This acreage and value includes a portion of the real estate under ICC AB 167 (Sub. No. 287) State Line M.P. 73.2 to West Slateford Junction M.P. 75.1). The value established by USRA assumes that real estate can be assembled and that sale transaction will occur within months or at least within a year. If the sale of the property requires a longer period of time, the base value must be discounted. Since experience has shown that it may require twenty or thirty years to dispose of all underlying real estate of abandoned rail lines, a discount percentage of 50 or 60 would be appropriate in determining present worth of a future series of sales.

Perhaps the logic of discounting real estate sales may be better explained by an example:

> Assume that a developer would be willing to acquire the railroad's 861 acres. Knowing that resale of all 861 acres would not likely occur in the first year from the date of sale, what price would he be willing to pay, considering that property now becomes taxable and that interest must be paid on money borrowed for purchase? Another measure to be considered is the financial reward from alternative investment opportunities (opportunity costs).

In this instance, as in the case of most railroad abandonments, the opportunity to sell real estate underlying the track is limited to sale to adjacent property owners. This can be a very long process, since there is little incentive for the property owner to purchase. In addition, since the rail line is situated in a rural area, placing an additional 861 acres of real estate on the market may significantly lower real estate prices generally within the affected area. It is for these reasons that 50 percent discount applied to the 1976 base value appears reasonable. The discounted real estate value for this segment is $120,240.

Since this amount applies to real estate underlying the track in both AB 167 (Sub No. 280) and AB 167 (Sub No. 287), we believe the amount assignable to AB 167 (Sub No. 280) to be $100,000.

Total Net Salvage

It has been demonstrated that cost of removal of the large bridges on great fills would exceed whatever

revenue the railroad would receive from the sale of salvageable materials. Therefore, an arbitrary amount of $2,500,000 has been assigned to "Net Bridge and Building Salvage" (Exhibit D), although the true amount for the removal of all the structures along the rail route would greatly exceed this amount. By summing gross salvage and net bridge and building salvage the result is a negative (-)$1,060,798.

Net Liquidation Value

Net Liquidation value of -$960,798 is established after summing all the items on "Adjusted Exhibit D".

Conclusion

A negative net liquidation implies that prospective purchaser would require something in addition to the property sufficient to make it worth his while to assume ownership. In this instance, the negative value represents the cost that someone must bear to remove the structures and restore the land after the railroad is abandoned, a cost most likely to be borne by the public. A better solution would be to make the cost of acquisition of the property attractive enough to a prospective purchaser so that it would continue as a railroad and therefore would not require the huge expenditures required if abandoned. If Conrail were a chemical company and the property to be disposed of was a hazardous waste dump, rather than the property with bridges and culverts, there would be no question about the negative value of the property, since the law would require the company to assume responsibility. Any prospective buyer, would, in turn, require that he be compensated for the liability in

assuming responsibility for the hazard. The same responsibility should be imputed in the development of the net liquidation value. ICC AB 167 Sub-No. 287, State Line M.P. 73.2—West Slateford Junction, M.P. 75.1-1.9 Miles.

Summary

Monroe County and Pocono Northeast Railway Inc. have made an offer of financial assistance—purchase to Conrail for that segment of the rail line between State Line M.P. 73.2 and West Slateford Junction M.P. 75.1. It would be inappropriate for us now to submit information about net liquidation value for such information may jeopardize the negotiations.

We would like to remind the ICC of a peculiarity of the easterly limits of the abandonment. State Line M.P. 73.2 is approximately in the center of the Delaware River Viaduct. In the event that negotiations between Conrail and Monroe County—Pocono Northeast Railway—are not fruitful, we believe that input provided by us in determining net liquidation value of that segment of the line between Port Morris Junction and State Line should also be applied in this instance. We strongly urge that cost of removal of the Delaware River Viaduct be included in determination of the net liquidation of value of the segment between State Line and West Slateford Junction.

Another method of developing value of a property is a comparison of the sale price of similar types of property. It reported that Conrail has agreed to sell to the D&HRR the northern portion of this same rail line between Scranton and Binghamton, 60 miles, for

$2,300,000. The sale price includes the sale of East Binghamton and Taylor Yards for $300,000.

Based on a $2,000,000 purchase price for this 60 mile double track rail segment, the cost per route mile would be $33,000 and $16,500 per track mile. Since there are 31.4 track miles in the segment between Port Morris Junction and State Line, a valuation of $518,000 would not be inappropriate because the largest item in the computation of net liquidation value as shown in Conrail Exhibit D is gross track salvage. This item is directly related to track miles rather than route miles.

WORK PAPER NO. 1
THROUGH WORK PAPER NO. 4
and
ATTACHMENTS A THROUGH I
ARE AVAILABLE UPON REQUEST.

Affidavit of P. A. Lieberman

POTENTIAL
RAIL TRAFFIC
VOLUME

DL&W MAIN LINE
EAST OF SCRANTON

Type of Traffic	Cars	Revenue
On-Line Local Pa.	5600	$1,000,000
Morris County N.J.	9000	$1,060,000
Passenger	49,644 persons	$ 574,000
Essex & Hudson Cos.	22,080	$2,318,500
Portland coal	8320	$ 871,600
TOTAL	45,000	$5,824,100

1981

No. 82-1722

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

COUNTY OF MONROE, *et al.*,

Petitioners,

v.

CONSOLIDATED RAIL CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the Special Court, Regional Rail Reorganization Act of 1973

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Where §1152 of the Northeast Rail Service Act ("NERSA") expressly provides that the Special Court, Regional Rail Reorganization Act, "shall have original and exclusive jurisdiction over any civil action . . . for injunctive, declaratory or other relief relating to the enforcement, operation, execution, or interpretation of any provision of [NERSA]," may petitioners bypass the Special Court's exclusive jurisdiction by seeking injunctive relief in the District Court in a civil antitrust action, where the object of the relief is to prevent abandonment by Consolidated Rail Corporation ("Conrail") of rail lines as approved under NERSA?

2. When the Special Court did not stay petitioners' antitrust action in the District Court, but merely enjoined petitioners from pursuing injunctive relief in another forum that would prevent Conrail from dismantling its lines as authorized under NERSA, did not the Special Court properly act within its exclusive jurisdiction under §1152 of NERSA?

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* In accordance with Rule 28.1, respondent states that, except wholly owned subsidiaries, it owns stock in the following affiliated companies: Akron & Barberton Belt Railroad Company, Albany Port Railroad Corporation, Belt Railway Company of Chicago, Calumet Western Railway Company, Canada Southern Railway Company, Chicago and Western Indiana Railway Company, Fruit Growers Express Company, Indiana Harbor Belt Railroad Company, Lakefront Dock and Railroad Terminal Company, Monongahela Railway Company, Nicholas, Fayette and Greenbrier Railroad Company, Peoria and Pekin Union Railway Company, Pittsburgh, Chartiers & Youghiogheny Railway Company, Terminal Railroad Association of St. Louis, Inc. and Toledo Terminal Railroad Company.

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TABLE OF AUTHORITIES

STATEMENT

Petitioners County of Monroe, Pennsylvania, and its commissioners (herein "petitioners") ask this Court to grant certiorari to review and reverse an order of the Special Court, Regional Rail Reorganization Act of 1973. In that order, the Special Court invoked its exclusive jurisdiction under §1152 of the Northeast Rail Service Act of 1981 ("NERSA"), 45 U.S.C.A. §1105 (West Supp. 1983), and enjoined petitioners from seeking *in another forum* injunctive relief which would prevent respondent Consolidated Rail Corporation ("Conrail") from implementing a plan to dismantle three segments of track on its Scranton Line, which runs between Scranton, Pennsylvania and Port Morris, New Jersey (herein "Scranton Line segments").

The essential facts are undisputed.

The Scranton Line has not been used as a passenger line since before Conrail was created by Congress almost ten years ago (Resp. App. A-15, A-16).[1] For more than three years, no freight has moved over the segments in issue (Resp. App. A-15, A-16). Conrail, wishing to utilize the rails of the Scranton Line segments as replacements on other lines where they were needed (Pet. App. 15a), instituted abandonment procedures as specified in §308 of the Regional Rail Reorganization Act of 1973 ("3-R Act"), 45 U.S.C.A. §748 (West Supp. 1983).[2] In due course Conrail obtained the requisite ICC approvals (Resp. App. A-7 to A-9, A-12 to A-13; Pet. App. 15a-16a). Petitioners who participated in the proceedings before the ICC do not dispute that Conrail followed the abandonment procedures established by NERSA.[3]

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1. Respondent's Appendix is referred to as "Resp. App." Petitioners' Appendix is referred to as "Pet. App."

2. Section 308 was added to the 3-R Act by §1156 of NERSA (Subtitle E of Title XI of the Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35) when Congress, finding that the then existing statutory framework regulating railroads was not adequate to permit the survival and viability of Conrail, established new procedures to facilitate the abandonment of unprofitable lines owned by Conrail. Section 308 is reproduced in Respondent's Appendix at page A-1.

3. A challenge to procedures followed by Conrail under NERSA, as incorporated in the 3-R Act, was dropped by petitioners (Pet. App. 16a)

Petitioners had the opportunity to buy the Scranton Line segments during the entire period of disuse. Indeed, petitioners had the absolute right under §308(e) of the 3-R Act to buy these segments at 75% of their net liquidation value as established by the ICC pursuant to procedures set forth in §308(d) of the 3-R Act. Petitioners failed to do so within the statutory period of 120 days prescribed by §308(e) of the 3-R Act (Pet. App. 15a-17a, 60a). Rather, petitioners brought an action in the Middle District of Pennsylvania seeking to enjoin Conrail from proceeding with its abandonment (Pet. App. 1a-8a, 60a). In that action, petitioners asserted that they and others "desire to purchase" all of the Scranton Line segments and certain viable lines (Pet. App. 5a). Petitioners' position was that Conrail either should be enjoined from abandoning the line or should sell it to Monroe County and others — and that, in the event of abandonment without sale, then Conrail was engaged in an attempt to monopolize in violation of Section 2 of the Sherman Act (Pet. App. 6a-7a).

Conrail thereupon instituted this action before the Special Court to enjoin petitioners from pursuing any injunctive relief which sought to forestall Conrail's abandonment program in *any* forum other than the Special Court (Pet. App. 20a-21a).[4] Conrail did not seek to enjoin the District Court for the Middle District of Pennsylvania;[5] Conrail only sought to keep petitioners from requesting an injunction in any forum *other* than the Special Court (Pet. App. 20a-21a; Resp. App. A-15).

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4. The jurisdiction of the Special Court on which the action was based is stated in §1152 of NERSA, 45 U.S.C.A. §1105 (West Supp. 1983), *inter alia*:

> (a) Notwithstanding any other provision of law, the Special Court shall have original and exclusive jurisdiction over any civil action—
>
> (1) For injunctive, declaratory or other relief relating to the enforcement, operation, execution, or interpretation of any provision of or amendment made by this [subtitle], or administrative action taken thereunder to the extent such action is subject to judicial review;...

5. A temporary restraining order issued by the Middle District, pending the decision of the Special Court, has expired by its terms and has not been renewed (Pet. App. 61a). Respondent's subsequent agreement was to take no action to remove rails until the Special Court acted on its complaint.

The Special Court, after analyzing its jurisdiction and the form of relief sought by petitioners, issued a narrow ruling enjoining petitioners "from pursuing further injunctive relief" in the action they had filed in the Middle District of Pennsylvania (Pet. App. 63a). A motion to the Special Court for a stay was denied (Pet. App. 65a-66a). Petitioners then filed a stay application with Chief Justice Burger which application, presenting the same arguments made in their petition here, was denied on April 28, 1983 (No. A-844.)

ARGUMENT

I.

THE SPECIAL COURT PROPERLY ASSERTED ITS EXCLUSIVE JURISDICTION OVER ANY INJUNCTIVE RELIEF THAT WOULD HAVE PREVENTED ABANDONMENT OF RAIL LINES AS AUTHORIZED UNDER NERSA.

The ruling of the Special Court of which petitioners seek review involves a jurisdictional issue of restricted scope, applicable only to Conrail under NERSA, and with no general applicability to other areas of the law or even to abandonment proceedings of other railroads. It has no precedential value in any other context.

Within the narrow compass of its ruling, the Special Court was clearly correct. The relief sought by petitioners in the Middle District of Pennsylvania was to enjoin Conrail "from abandoning and liquidating" its Scranton Line, "or any segment thereof" (Pet. App. 70a). The Special Court found that such relief relates to the precise abandonment procedures authorized by Congress in NERSA (Pet. App. 63a). The Special Court thus concluded that the relief sought by petitioners "falls squarely" within the exclusive jurisdiction of the Special Court, as set forth in § 1152 of NERSA, 45 U.S.C.A. § 1105 (West Supp. 1983). *Id.* Accordingly, the Special Court enjoined petitioners from seeking such injunctive relief against Conrail in another forum.[6]

The Special Court's ruling is hardly open to dispute. The Congressional purpose for the Special Court's exercise of § 1152 jurisdiction is both recent and clear. Acting to prevent a collapse of the railroad system in the Northeastern United States, Congress enacted NERSA in 1981 and, by adding § 308 to the 3-R Act, 45 U.S.C.A. § 748, authorized Conrail to accomplish a far-reaching program of line abandonments without delay. The

6. The decision was issued by the Section 1152 Panel of the Special Court consisting of Presiding Judge Oliver Gasch, and Judges William B. Bryant and Charles R. Weiner (Pet. App. 56a-64a).

NERSA abandonment authorization was narrowly conceived, applying only to Conrail; and Conrail immediately began an abandonment program, because by § 1142 of NERSA Congress had imposed on Conrail a statutory imperative to establish its viability by 1983 or face its own liquidation. 3-R Act § 403, 45 U.S.C.A. § 763 (West Supp. 1983).

Section 1152 was essential to the fulfillment of the NERSA abandonment program, and in any event is not ambiguous, granting as it does to the Special Court exclusive jurisdiction over any court action "for injunctive, declaratory, or other relief relating to the enforcement, operation, execution or interpretation of any provision of or amendment made by this [subtitle], or administrative action taken thereunder...." The injunctive relief requested by petitioners in the District Court thus fits precisely within the specific and essential jurisdiction of the Special Court.

The Special Court's order is a narrow one. Nothing in the order precludes petitioners from pursuing their request for injunctive relief against Conrail *before the Special Court* itself — on whatever grounds petitioners choose to assert, whether those grounds be failed negotiations (Pet. App. 16a), attempts to monopolize (Pet. App. 7a), or some other theory. However, whatever theory petitioners may adopt in seeking to enjoin Conrail's abandonment program, they must assert it before the Special Court, and not before some other forum which petitioners may prefer. In short, petitioners are not entitled to their choice of forum when the relief they seek is to enjoin Conrail from abandonment of rail lines under NERSA, since that issue has been exclusively vested by Congress in the Special Court.

II.

PETITIONERS' GROUNDS FOR REVIEW OF THE SPECIAL COURT'S ORDER ARE NEITHER SIGNIFICANT NOR MERITORIOUS.

Petitioners assert four reasons which are claimed to justify a grant of certiorari. None is significant or meritorious:

A. The Claim That Petitioners Must Now Bifurcate Their Antitrust Relief.

Petitioners' claim that the Special Court has made them bifurcate their antitrust relief has a hollow ring in the face of the fact, obvious from the pleadings, that the antitrust complaint is a sham.

Conrail received approval from the ICC under NERSA to abandon specified unprofitable segments of the Scranton Line, while retaining those portions that were viable (Resp. App. A-4 to A-13; Pet. App. 14a-16a). The abandoned segments were redundant in that no shippers or receivers were located on them. The intervening segment of the line was determined by Conrail to be making a financial contribution to the system and was continued in service via a connection with another rail line (Pet. App. 17a). Petitioners concede in their petition (at page 7) that Conrail's designation of the out-of-service segments for abandonment "was actually part of a plan by Conrail to enhance other lines." As the Special Court recognized,

> . . . Congress intended that the abbreviated abandonment procedure added to the 3R Act by NRSA would permit Conrail to expeditiously dispose of obsolete or unprofitable lines *in favor of service on the railroad lines with the best opportunity for growth and profitability*.

(Pet. App. 58a, emphasis added). Yet, the sole basis for petitioners' antitrust claim is that Conrail followed the abandonment procedure authorized by Congress to make Conrail economically viable. There can be no possible attempt to monopolize in carrying out the process specifically designed for Conrail by

NERSA.[7] Thus, the antitrust allegations are a sham designed to maintain the case in the Middle District of Pennsylvania, and to avoid the jurisdiction of the Special Court.

Even apart from the sham nature of their antitrust complaint, petitioners' claim that the order of the Special Court improperly requires them to split their request for injunctive relief and their claim for "such other and further relief as the court deems proper and just" between the Special Court and the District Court is without merit, since that argument is only a rephrasing of the argument, disposed of above, that they have the right to seek injunctive relief in the District Court. But that is precisely what Congress in NERSA said they cannot do when the relief affects Conrail's abandonment program under that Act.

In enacting NERSA, Congress intended to expedite those processes, including abandonments of unprofitable rail lines, which would allow Conrail to operate a self-sustaining railroad

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7. Even a brief examination of petitioners' amended complaint before the District Court on the antitrust count (Pet. App. 1a-8a) will reveal that there is no colorable basis for the claim that Conrail's abandonment of these rail segments is an attempt to monopolize in violation of Section 2 of the Sherman Act. The only paragraphs of the complaint (¶¶ 17-22) describing alleged violative acts reveal their sham nature: Paragraph 17 of the amended complaint refers to the liquidation prices; the liquidation prices of the segments were established by the ICC under §308 of the 3-R Act, not by Conrail (Resp. App. A-9, A-12, A-13). Paragraphs 18-20 allege the abandonments of the segments were on differing schedules, but the record before the Special Court shows this to be the result of petitioners having made offers to purchase two of the segments in Pennsylvania (Resp. App. A-10). Finally, in paragraphs 20-21, petitioners allege that "they and others" desire to purchase the Scranton Line segments and have been denied the opportunity to do so. However, the undisputed record establishes that the statutory offers to purchase the two Pennsylvania segments were withdrawn by petitioners on June 17, 1982 (Resp. App. A-10).

On their face, the above allegations do not constitute any attempt to monopolize, and there are no other allegations on that subject. Indeed, counsel for petitioners conceded in the Special Court that they "were perfectly happy to have Conrail provide that service," which is hardly a complaint about an alleged monopolist (Resp. App. A-17).

system in the Northeast. NERSA §1132, 45 U.S.C.A. §1101 (West Supp. 1983). In NERSA, Congress expressly required that all requests for relief affecting the operation of NERSA rest with the Special Court, thereby seeking to assure speedy accomplishment of the purposes of NERSA, as well as consistency of its application. As this Court has acknowledged in another context, reference of certain questions to a court having specialized expertise saves judicial time and resources, *Lehman Brothers v. Schein*, 416 U.S. 386, 391 (1974), and, of course, prevents potential conflicting decisions.

Moreover, contrary to petitioners' assertion, the Special Court was careful to state that it was "not attempting to stay the district court in the proper exercise of its jurisdiction" (Pet. App. 63a). Section 1152 explicitly grants exclusive jurisdiction to the Special Court "over any civil action . . . for injunctive . . . relief relating to the . . . operation [of NERSA] or administrative action taken thereunder. . . ." The injunctive relief sought by petitioners unquestionably lies within the statutory bounds. Yet, as the Special Court recognized, "implicit in the grant of original and exclusive jurisdiction to the Special Court under NRSA is the intention that it not consider every issue which might tangentially touch the provisions of NRSA" (Pet. App. 62a). The Special Court was scrupulous to assert its exclusive jurisdiction only over that aspect of petitioners' claim for injunctive relief that has an impact on the implementation of §308.[8]

In their action in the District Court, petitioners also seek "other relief" and it is clear from their own petition that, even if

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8. Courts have found that an antitrust plaintiff will not be prejudiced if compelled to establish its right to damages in a separate phase of the case. *In re Master Key Antitrust Litigation*, 528 F.2d 5 (2d Cir. 1975); *LoCicero v. Humble Oil & Refining Co.*, 52 F.R.D. 28 (E.D. La. 1971). In *Goldfarb v. Virginia State Bar*, 421 U.S. 773, *rehearing denied*, 423 U.S. 886 (1975), the issue of damages was ordered to be determined in a separate trial from the grant of injunctive relief. Manifestly, the ruling by the Special Court that injunctive relief—which is not a jury matter—against Conrail's NERSA-approved abandonments must be sought before the Special Court and not before the court which has jurisdiction over other liability and damages aspects of the antitrust claim is unexceptional, and does not require reversal.

there is found to be any antitrust liability, what is involved is no more than a question of money. At page 12 of their petition, petitioners set forth the exact damages per mile of track they claim they would suffer if the line were dismantled. Thus, if the rails are removed by Conrail in its efforts to rehabilitate other lines, and that removal is adjudged to be wrongful, the Scranton Line may be restored by replacing the rails and the cost of replacement can be determined as a liquidated sum. Even the cost of renewing easements or taking by eminent domain land which might be subject to reversionary interests has a monetary cost which can be calculated. Thus, to the extent that such relief may not be available in the Special Court, petitioners have a full and adequate remedy in damages in the District Court for any alleged antitrust violation.

B. The Claim That the District Court Had Assumed Jurisdiction of the Requested Relief.

Petitioners' claim that the District Court had assumed jurisdiction over the request for injunctive relief is at odds with the District Court's own statement that it did *not* address the jurisdiction issue, Chief Judge Nealon specifically recognizing that this issue was being decided by the Special Court (Pet. App. 32a n.1).[9] The entry of a temporary restraining order, limited to a ten-day period, was not an assertion by the District Court of any right to award injunctive relief on either a preliminary or permanent basis.[10] The order of the Special Court granting Conrail's request for declaratory judgment is thus not in conflict with any

9. The Special Court has made it clear that it should have the opportunity to decide the question of its exclusive jurisdiction prior to an adjudication of the jurisdiction issue in any other forum. *See Consolidated Rail Corp. v. Illinois*, 423 F. Supp. 941, 950 (Sp. Ct., 3-R Act 1976), *cert. denied*, 429 U.S. 1095 (1977).

10. *Pan American Petroleum Corp. v. Superior Court of Delaware*, 366 U.S. 656 (1961), cited by petitioners, is inapposite because that case did not involve a conflict of federal exclusive jurisdiction, but rather the jurisdiction of a state court over a simple contract action to recover payments made in excess of those stipulated by contracts governed by state law. Here petitioners assert a claim under federal law and request injunctive relief as to which Congress has declared the Special Court to have exclusive jurisdiction.

action of the District Court, or with any decision of any other court.

C. The Claim That the Special Court Lacks Power to Enjoin Proceedings in the District Court.

Petitioners' assertion that the Special Court lacks power under NERSA to enjoin or stay proceedings in a federal district court is irrelevant since the Special Court did *not* enjoin the District Court, but only petitioners, and even then only enjoined petitioners from pursuing injunctive relief in the District Court (Pet. App. 63a). In any event, petitioners have misread the applicability of §209 of the 3-R Act, 45 U.S.C. §719(g), to the Special Court's powers under §1152 of NERSA. The abandonment provisions in §308 are part of the 3-R Act, referred to as "this Act" in §209(g). Therefore, even as petitioners apparently concede at page 23 of their petition, the injunctive and stay powers granted to the Special Court by §209(g) would support a Special Court stay of proceedings before the District Court.

Nevertheless, there was no need to reach this issue in the Special Court. That Court enjoined *petitioners* from pursuing the requested injunctive relief in the Middle District of Pennsylvania, but it did not attempt to stay the District Court (Pet. App. 63a). *Cf. Consolidated Rail Corp. v. Illinois*, 423 F. Supp. 941 (Sp. Ct., 3-R Act 1976), *cert. denied*, 429 U.S. 1095 (1977) (The Special Court asserted its jurisdiction under the 3-R Act and declared void an order of a district court).

D. The Claim That Petitioners Were Denied the Right to Plead or Present Evidence.

Finally, petitioners claim that they were deprived of the right to an evidentiary hearing and the right to file responsive pleadings. This claim is patently frivolous. Petitioners filed objections to Conrail's complaint in the Special Court and also filed a motion to dismiss Conrail's complaint (Petition, p. 6). Petitioners obviously had ample opportunity to, and did, file responsive pleadings with the Special Court.

Also, petitioners were not deprived of an opportunity to present any relevant evidence to the Special Court. Conrail invoked the Special Court's jurisdiction to decide a legal issue by way of a motion for declaratory judgment under Rule 57, Federal Rules of Civil Procedure, and 28 U.S.C. §2201, and for injunctive relief under Rule 65, Federal Rules of Civil Procedure. Extensive argument on that legal issue was held before the Special Court. The Special Court had before it the pleadings in the District Court and the undisputed notices, decisions and orders of the ICC authorizing abandonment of portions of Conrail's Scranton Line (Resp. App. A-16, A-19 to A-21). No other evidence of any kind would have been relevant to the legal issue or would have warranted a different determination. An order granting a declaratory judgment and permanent injunctive relief was appropriate to settle the controversy as to jurisdiction. Clearly, no rights of petitioners to plead or to be heard were violated.

CONCLUSION

The Special Court's ruling is narrowly framed, involving only its jurisdiction over one form of relief sought in a particular NERSA-related claim brought against Conrail. The Special Court is developing its jurisdiction and the ruling here is not in conflict with any decision by any other court.[11] Moreover, that ruling concerns only the jurisdiction of the Special Court in matters relating to NERSA abandonments by Conrail. Obviously, no special and important reason for a grant of certiorari is present here.

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11. This is the first case in which the Special Court has examined the scope of its jurisdiction under §1152, enacted in 1981. There are two other cases pending before the Special Court presenting challenges to the jurisdiction of that Court under §1152: *Consolidated Rail Corp. v. Pennsylvania Public Utility Commission*, Special Court, 3-R Act, No. C.A. 83-6 (involving jurisdiction of state public utility commissions over rail abandonments), and *Consolidated Rail Corp. v. Schumm*, Special Court, 3-R Act, No. C.A. 83-8 (involving jurisdiction of state courts to interfere with NERSA-approved abandonments). The Special Court is only beginning the process of defining its jurisdiction under §1152, and it should be allowed to develop its jurisprudence before this Court reviews that question.

For the above reasons, we respectfully urge that the petition for a writ of certiorari to the Special Court should be denied.

Respectfully submitted,

/s/

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Of Counsel.

Dated: May 19, 1983.

RESPONDENT'S APPENDIX

§ 308 of the 3-R Act as added by § 1156 of NERSA, Subtitle E, Omnibus Budget Reconciliation Act, P.L. 97-35 (August 13, 1981), codified at 45 U.S.C.A. § 748 (West Supp. 1983)

ABANDONMENTS

SEC. 1156. (a) Title III of the Regional Rail Reorganization Act of 1973 is amended by adding at the end thereof the following new section:

ABANDONMENTS

"SEC. 308. (a) GENERAL.—The Corporation may, in accordance with this section, file with the Commission an application for a certificate of abandonment for any line which is part of the system of the Corporation. Any such application shall be governed by this section and shall not, except as specifically provided in this section, be subject to the provisions of chapter 109 of title 49, United States Code.

"(b) APPLICATIONS FOR ABANDONMENT.—Any application for abandonment that is filed by the Corporation under this section before December 1, 1981, shall be granted by the Commission within 90 days after the date such application is filed unless, within such 90-day period, an offer of financial assistance is made in accordance with subsection (d) of this section with respect to the line to be abandoned.

"(c) NOTICE OF INSUFFICIENT REVENUES.—(1) The Corporation may, prior to November 1, 1983, file with the Commission a notice of insufficient revenues for any line which is part of the system of the Corporation.

"(2) At any time after the 90-day period beginning with the filing of a notice of insufficient revenues for a line, the Corporation may file an application for abandonment for such line. An application for abandonment that is filed by the Corporation under this subsection for a line for which a notice of insufficient revenues was filed under paragraph (1) shall be granted by the Commission within 90 days after the date of such application is

filed unless, within such 90-day period, an offer of financial assistance is made in accordance with subsection (d) of this section with respect to such line.

"(d) OFFERS OF FINANCIAL ASSISTANCE.—The provisions of section 10905 (d)-(f) of title 49, United States Code (including the timing requirements of subsection (d) thereof), shall apply to any offer of financial assistance under subsection (b) or (c) of this section. [See pages A-4 to A-6, *infra*.]

"(2) The Corporation shall provide any person that intends to make an offer of financial assistance under subsection (b) or (c) of this section with such information as the Commission may require.

"LIQUIDATION.—(1) If any application for abandonment is granted under subsection (b) of this section, the Commission shall, as soon as practicable, appraise the net liquidation value of the line to be abandoned, and shall publish notice of such appraisal in the Federal Register.

"(2) Appraisals made under paragraph (1) shall not be appealable.

"(3)(A) If, within 120 days after the date on which an appraisal is published in the Federal Register under paragraph (1), the Corporation receives a bona fide offer for the sale, for 75 percent of the amount at which the liquidation value of such line was appraised by the Commission, of the line to be abandoned, the Corporation shall sell such line and the Commission shall, unless the parties otherwise agree, establish an equitable division of joint rates for through routes over such lines.

"(B) If the Corporation receives no bona fide offer under subparagraph (A), within such 120-day period, the Corporation may abandon or dispose of the line as it chooses, except that the Corporation may not dismantle bridges, or other structures (not including rail, signals, and other rail facilities) for 120 days thereafter. The Secretary may require that bridges or other structures (not including rail, signals, and other rail facilities), not be dismantled for an additional 8 months if he assumes all liability of any sort related to such property.

"(4) If the purchaser under paragraph (3) (A) of this subsection of any line of the Corporation abandons such line within five years after such purchase, the proceeds of any track liquidations shall be paid into the general fund of the Treasury of the United States.

"(f) EMPLOYEE PROTECTION.—The provisions of section 10903(b) (2) of title 49, United States Code, shall not apply to any abandonment granted under this section. Any employee who was protected by the compensatory provisions of title V of this Act immediately prior to the effective date of the Northeast Rail Service Act of 1981, who is deprived of employment by such an abandonment shall be eligible for employee protection under section 701 of this Act".

(b) The table of contents of the Regional Rail Reorganization Act of 1973, as amended by this subtitle, is further amended by inserting immediately after the item relating to section 307 the following new item:

"Sec. 308. Abandonments."

Excerpts from 49 U.S.C.A. § 10905 (West Supp. 1983) (incorporated by reference in § 308 of 3-R Act, 45 U.S.C.A. § 748) (West Supp. 1983)

(d) If, within 15 days after the publication required in subsection (c) of this section, the Commission finds that—

(1) a financially responsible person (including a government authority) has offered financial assistance to enable the rail transportation to be continued over that part of the railroad line to be abandoned or over which all rail transportation is to be discontinued; and

(2) it is likely that the assistance would be equal to—

(A) the difference between the revenues attributable to that part of the railroad line and the avoidable cost of providing rail freight transportation on the line, plus a reasonable return on the value of the line; or

(B) the acquisition cost of that part of the railroad line;

the Commission shall postpone the issuance of a certificate authorizing abandonment or discontinuance in accordance with subsections (e) and (f) of this section.

(e) If the carrier and a person offering financial assistance enter into an agreement which will provide continued rail service, the Commission shall postpone the issuance of the certificate for so long as the agreement, or an extension or modification of the agreement, is in effect. If the carrier and a person offering to purchase a line enter into an agreement which will provide continued rail service, the Commission shall approve the transaction and dismiss the application for abandonment or discontinuance. If the carrier and a financially responsible person (including a government authority) fail to agree on the amount or terms of the subsidy or purchase, either party may, within 30 days after the offer is made, request that the Commission establish the conditions and amount of compensation. If no agreement is reached within 30 days after the offer is made and neither party requests that the Commission establish the condi-

tions and amount of compensation during that same period, the Commission shall immediately issue a certificate authorizing the abandonment or discontinuance.

(f)(1) Whenever the Commission is requested to establish the conditions and amount of compensation under this section—

(A) the Commission shall render its decision within 60 days;

(B) where subsidy has been offered, the Commission shall determine the amount and terms of subsidy based on the avoidable cost of providing continued rail transportation, plus a reasonable return on the value of the line; and

(C) where an offer of purchase has been made in order to continue rail service on the line, the Commission shall determine the price and other terms of sale. In no case shall the Commission set a price which is below the fair market value of the line (including, unless otherwise mutually agreed, all facilities on the line or portion necessary to provide effective transportation services).

(2) The decision of the Commission shall be binding on both parties, except that the person who has offered to subsidize or purchase the line may withdraw his offer within 10 days of the Commission's decision. In such a case, the Commission shall immediately issue a certificate authorizing the abandonment or discontinuance, unless other offers are being considered pursuant to paragraph (3) of this subsection.

(3) If a carrier receives more than one offer to purchase or subsidize, it shall select the offeror with whom it wishes to transact business, and complete the sale or subsidy agreement, or request that the Commission establish the conditions and amount of compensation prior to the 40th day after the date on which notice was published under subsection (c) of this section. If no agreement on subsidy or sale is reached within the 40-day period and the Commission has not been requested to establish the conditions and amount of compensation, any other offeror may request that the Commission establish the conditions and

amount of compensation. If the Commission has established the conditions and amount of compensation and the original offer has been withdrawn, any other offeror may accept the Commission's decision within 20 days of such decision, and the Commission shall require the carrier to enter into a sale or subsidy agreement with such offeror, if such sale or agreement incorporates the Commission's decision.

(4) No purchaser of a line or portion of line sold under this section may transfer or discontinue service on such line prior to the end of the second year after consummation of the sale, nor may such purchaser transfer such line, except to the carrier from whom it was purchased, prior to the end of the fifth year after consummation of the sale.

(5) Any subsidy provided under this section may be discontinued on notice of 60 days. Unless, within such 60-day period, another financially responsible party enters into a subsidy agreement at least as beneficial to the carrier as that which was or was to be discontinued, the Commission shall, at the carrier's request, immediately issue a certificate authorizing the abandonment or discontinuance of service on the line.

INTERSTATE COMMERCE COMMISSION

CERTIFICATE AND DECISION

Docket No. AB-167 (Sub-No. 280N)

CONRAIL ABANDONMENT BETWEEN PORT MORRIS JCT AND STATE LINE, NJ
Decided: February 24, 1982

On November 30, 1981, Consolidated Rail Corporation (Conrail) filed an application pursuant to section 308 of the Regional Rail Reorganization Act of 1973[1] to abandon 27.5 miles of its rail line between Port Morris Jct (milepost 45.7) and State Line (milepost 73.2) in Morris, Warren and Sussex Counties, NJ.

Under section 308(b) the Commission must grant any application for abandonment filed by Conrail before December 1, 1981, within 90 days after the date such application is filed unless an offer of financial assistance is made pursuant to section 308(d) during that 90-day period. Because no offer of financial assistance has been received, the application is granted.

Congress has directed the Commission to appraise the net liquidation value of each Conrail line being abandoned Under Section 308(e) any interested party would be able to purchase such a line at 75 percent of the value set by the Commission.

With its application Conrail submitted a statement that its estimate of the line's net liquidation value is $1,717,250.

The Commission intends to adopt this estimate unless, within 15 days from date of service of this order, an interested party requests that the Commission independently appraise the line. If such a request is made, the Commission will, as soon as practicable, set a value for the line based on any information available. That determination will be published in the *Federal Register* and is not appealable. If no request is made the Commission will publish Conrail's estimate in the *Federal Register*.

1. This section was added by the Northeast Rail Service Act of 1981. Pub. L. 97-35.

If any interested parties have pertinent data on the net liquidation value of this line, they should submit it to the Commission's Section of Finance, Room 5414, 12th and Constitution Ave., N.W., Washington, DC 20423.

It is certified: Conrail is authorized to abandon the line described above.

It is ordered:

The certificate and decision are effective upon service.

By the Commission, Review Board Number 2, Members Carleton, Fisher and Williams.

Agatha L. Mergenovich
Secretary

(SEAL)

EXHIBIT A

Federal Register/Vol. 47. No. 146/Thursday,
July 29, 1982/Notices

* * *

INTERSTATE COMMERCE COMMISSION

[Docket No. AB-167 (Sub-No. 280N)]

Conrail Abandonment Between Port Morris Jct and State Line, NJ; Notice of Findings

Notice is hereby given pursuant to section 308(e) of the Regional Rail Reorganization Act of 1973 that the Commission, Review Board Number 2 has issued a certificate authorizing the Consolidated Rail Corporation to abandon its rail line between Port Morris Jct and State Line in the Counties of Morris, Warren, and Sussex, NJ, a total distance of 27.5 miles effective on March 11, 1982.

The net liquidation value of the line is $2,210,601. If, within 120 days from the date of this publication, Conrail receives a bona fide offer for the sale, for 75 percent of the net liquidation value, of this line it shall sell such line and the Commission shall, unless the parties otherwise agree, establish an equitable division of joint rates for through routes over such lines.

Agatha L. Mergenovich
Secretary

[FR Doc. 82-20492 Filed 7-28-82 8:45 a.m.]

* * *

EXHIBIT B

A-10

WITKOWSKI, WEINER, MCCAFFREY AND BRODSKY, P.C.

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GEORGE J. LEIBOWITZ
COUNSEL

June 17, 1982

Section of Finance
Interstate Commerce Commission
Room 5420
12th Street & Constitution Avenue, N.W.
Washington, D.C. 20423

Re: Docket No. AB-167 (Sub-No. 281 N) and
Docket AB-167 (Sub-No. 287 N)

Dear Sirs:

On June 7, 1982, the Interstate Commerce Commission served a supplemental decision establishing the sale terms in the above-referenced dockets. The Commission's order established June 17, 1982, as the deadline for a statement of intent to purchase the lines at the specified terms.

Pocono Northeast Railway, Inc. (PNR) and the Monroe County Rail Authority have determined the Commission's sale terms to be unacceptable and hereby withdraw their offers of financial assistance. PNR and Monroe County intend to pursue acquisition of these lines pursuant to the discount purchase pro-

visions established by section 1156 of the Northest Rail Service Act of 1981.

Respectfully submitted,
POCONO NORTHEAST RAILWAY, INC.
MONROE COUNTY RAIL AUTHORITY
by their special counsel
Witkowski, Weiner, McCaffrey
and Brodsky, P.C.
Suite 350
1575 Eye Street, N.W.
Washington, D.C. 20005

/s/ Peter A. Gilbertson

Peter A. Gilbertson

EXHIBIT C

Federal Register/Vol. 47. No. 207/Tuesday,
October 26, 1982/Notices

* * *

[Docket No. AB-167 (Sub No. 287N)]

Rail Carriers; Conrail Abandonment Between State Line and W. Slateford, PA; Findings

Notice is hereby given pursuant to Section 308(e) of the Regional Rail Reorganization Act of 1973 that the Commission, Review Board Number 3 has issued a certificate authorizing the Consolidated Rail Corporation to abandon its rail line between the NJ-PA State line, milepost 73.2 and W. Slateford, milepost 75.1 in the County of Northampton, PA, a total distance of 1.9 miles effective on July 7, 1982.

The net liquidation value of this line is $119,303. If, within 120 days from the date of this publication, Conrail receives a bona fide offer for the sale, for 75 percent of the liquidation value, of this line it shall sell such line and the Commission shall, unless the parties otherwise agree, establish an equitable division of joint rates for through routes over such lines.

Agatha L. Mergenovich.
Secretary.

[FR Doc. 82-29302 Filed 10-25-82 8:45 a.m.]

* * *

EXHIBIT D

Federal Register/Vol. 47, No. 210/Friday,
October 29, 1982/Notices

* * *

INTERSTATE COMMERCE COMMISSION

[Docket No. AB-167 (Sub-No. 281N)]

Conrail Abandonment Between West Gravel Place and Mount Pocono, Pa.; Notice of Findings

Notice is hereby given pursuant to Section 308(e) of the Regional Rail Reorganization Act of 1973 that the Commission, Review Board Number 3 has issued a certificate and decision authorizing the Consolidated Rail Corporation to abandon its rail line between West Gravel Place, milepost 84.6 and Mount Pocono, milepost 100.4 in the County of Monroe, Pa, a total distance of 15.8 miles effective on July 7, 1982.

The net liquidation value of this line is $1,691,974. If, within 120 days from the date of this publication, Conrail received a bona fide offer for the sale, for 75 percent of the net liquidation value, of this line it shall sell such line and the Commission shall, unless the parties otherwise agree, establish an equitable division of joint rates for through routes over such lines.

Agatha L. Mergenovich
Secretary

[FR Doc. 82-29757 Filed 10-28-82, 8:45 a.m.]

* * *

EXHIBIT E

SPECIAL COURT

REGIONAL RAIL REORGANIZATION ACT OF 1973

Consolidated Rail Corporation,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Sec. 1152 Panel
	:	C.A. No. 83-01
County of Monroe; Nancy Shukaitas, Chairman, Monroe County Board of Commissioners, individually and in her official capacity; Jesse D. Pierson, Member, Monroe County Board of Commissioners, individualy and in his official capacity; and Thomas R. Joyce, Member, Monroe County Board of Commissioners, individually and in his official capacity,	:	
Defendants.	:	

Courtroom No. 21
United States Court House
Third and Constitution Ave., N.W.
Washington, D.C. 20001
March 11, 1983

The above matter came on before the Honorable Oliver Gasch, United States District Court Judge (presiding), The Honorable William B. Bryant, United States District Court Judge, and The Honorable Charles R. Weiner, United States District Court Judge, for oral argument on plaintiff's motion for a preliminary injunction and declaratory judgment, at 9:30 A.M.

* * *

[8] [Mr. Shestack:] Just a microcosm of many cases — unviable because Conrail can't dispose of its unprofitable lines and face a deadline on July 1st where it is nonviable and there

has to be a liquidation. After all, Conrail is not owned by private parties. It is owned by the United States Government at this point. And it is under a direction by the United States Government to make it viable.

And the NERSA Act which provided this procedure in 1981 was because Congress realized that their whole system was at stake. Your honors will recall that Conrail was created to take over six bankrupt railways because the whole railway system in the northeast part of the United States was in jeopardy. And they took it over. And they couldn't make it viable. There were still huge deficits which were being supplied by the United States Government, and part of the viability was to abandon these lines.

So what Conrail did is it surveyed 17,000 miles of line; it came up with 2,000 miles that were to be viable; it was going to save a lot of money by doing it. It went to Congress; it published a plan. At that time it was under a moratorium not to abandon anything. Congress then enacted NERSA, giving this court extraordinary jurisdiction, greater jurisdiction that it had before, and provided this speedy procedure.

Monroe County knew all of that. It had years to [9] negotiate. These three segments, your Honor, have not had freight run on them for three years, not had passengers run on them for ten years. There was plenty of opportunity for the county to buy this line, to do what they wanted with it, or to follow the I.C.C. procedure where you can buy it at net liquidation value.

Judge Weiner: Your position is that if they want to go ahead with their antitrust action, you have no objection to that, as long as that doesn't speak to preventing you from abandoning the lines that are there now.

Mr. Shestack: That's right, your Honor.

Judge Weiner: In other words, you are prepared to defend the antitrust action as such, if it is truly an antitrust action.

Mr. Shestack: That's correct, your Honor.

Judge Weiner: But you don't want any interference with your abandonment.

Mr. Shestack: That is it precisely, your Honor. And this Court has the exclusive jurisdiction to decide that.

Judge Bryant: That is their prayer for relief in the Pennsylvania Court: To enjoin abandonment.

Mr. Shestack: That is exactly it, your Honor. I will read it to you.

Judge Bryant: I read it.

Judge Weiner: We have read it.

* * *

[12] [Mr. Shestack:] few other cases sent it back.

Now, I would like to address just one other matter. Monroe County says in this complaint they want to purchase this. Now, first of all, your Honor, it sounds reasonable, right? If a county wants to purchase this line, why shouldn't they really be able to purchase this line? Well, one might say here's a line that has not had passenger service for ten years, not had freight service for three years. There are plenty of opportunities under the law. There is about three or four different ways that you can purchase a railroad. You can even condemn it yourself, if you are a county. They didn't do any of that. Then NERSA sets up a procedure which allows you to purchase it for 75 percent. They didn't do that.

Yesterday we get a dramatic letter — I am sure you are going to hear about it — from Mr. Heffner from Monroe County, says, "We are ready to purchase it." And at what price are they ready to purchase it? At 30 percent of the net liquidated value established by the I.C.C., which is an unappealable value. Before the I.C.C., Monroe County submitted their appraisals of what they thought it was worth. So did Conrail submit its appraisals of what it thought it was worth. And the I.C.C. wrote — and your honors have the documents — a ten-page opinion the

first time, and then they have further arguments from Monroe County, so another ten-page opinion. You might even say — and we haven't bothered to argue it, but [13] it is true that when they argued all this before the I.C.C., they are bound by principles of res judicata or collateral estoppel, and they can't go into the liquidation again. But you don't even have to use that, because Congress specifically says that the liquidation value set is non-appealable.

And one of the prices Conrail has to pay is after the I.C.C. sets the liquidation value, you can buy it at a 75 percent discount. And what is it a discount of? Not even the going market value of that segment, but just the liquidation value, the net liquidation value, which is a knocked-down price. And what do they come in with with their letter yesterday which was sent to us? At 30 percent of the net liquidation value. And then they have a bunch of conditions on it.

One of the conditions is that they have to get the money from the federal government. And a congressman told them they might get the money from the federal government. Well, it is a long way between asking the federal government for getting money these days and getting the money.

And then the other aspect is to the extent they don't get the money from the federal government, another condition is that they get the money from the bank at prevailing interest rates, which is another big "if".

Then they put on conditions; they want trackage

* * *

[23] [Mr. Heffner:] some other railroad. We were perfectly happy to have Conrail provide that service. And Conrail was the one who walked away. They abandoned us; we didn't abandon them. And thus far, those efforts have been unsuccessful.

We have tried to go to other railroads and say, "If Conrail won't provide the service, will you provide it?" And they have said, "Yes, but, we will do it if we can get the entire line as a

package all the way from Scranton into the New York city area." They other railroads would say, "there is nothing we can do with it," a ten-mile or fifteen-mile piece with no on-line industry. But Monroe County realized that it had to do something, so on March 8th, as kind of a last-ditch effort, we made another offer to buy these lines, to buy the three segments, if worse came to worse, with intervening trackage rights, and, if possible, to buy the entire piece from Scranton to Port Norris, where New Jersey's DOT ownership begins.

Monroe County's position can be summed up briefly in four points.

There is no basis for this court to entertain Conrail's action under Section 209(g) of the RRR Act or Seciton 1152 of NERSA.

Two, Monroe County is not trying to challenge the I.C.C. abandonment orders through court proceedings.

Three, neither NERSA nor the RRR Act preclude —

* * *

SPECIAL COURT

REGIONAL RAIL REORGANIZATION ACT OF 1973

CONSOLIDATED RAIL CORPORATION,	:	
Plaintiff,	:	
v.	:	CA 83-1
COUNTY OF MONROE, *et al.*,	:	
Defendants.	:	
	:	

DOCUMENTS RELATED TO ICC APPROVAL OF CONRAIL'S ABANDONMENT OF NEW JERSEY AND PENNSYLVANIA SECTIONS OF SCRANTON LINE

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Dated: March 7, 1983

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